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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1912.~~ 1913

No. ~~605.~~ 289

MARY R. PEABODY, SACO AND BIDDEFORD SAVINGS INSTITUTION, SAMUEL ELLERY JENNISON, AND THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 29, 1912.

(23,270)

1

I. *Original Petitions, etc.*

No. 27500.

MARY R. PEABODY
vs.
THE UNITED STATES.

No. 27501.

SACO AND BIDDEFORD SAVINGS INSTITUTION
vs.
THE UNITED STATES.

No. 27502.

SAMUEL ELLERY JENNISON
vs.
THE UNITED STATES.

No. 27503.

THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY
vs.
THE UNITED STATES.

On March 2, 1905 the petitions were filed in the above-entitled cases.

On May 8, 1906 motions were made to consolidate the above causes which were allowed by the Court May 14, 1906.

On May 10, 1906 the defendants filed demurrers in each of said cases, which demurrers were argued and submitted on October 29, 1907.

On December 2, 1907 the opinion of the Court by Barney, J. was filed and it was ordered that the demurrer be sustained with leave to the claimants to amend the petition within sixty days.

Subsequently, to wit, on the dates hereafter mentioned, the claimants filed amended petitions in Nos. 27,500, 27,502 and 27,503, but elected not to amend No. 27,501 and to stand on the original petition in said case.

Said petitions are as follows:

2 II. *Amended Petition in Mary R. Peabody. Filed Dec.* 20, 1907.

In the Court of Claims, December Term, 1907.

No. 27500.

MARY R. PEABODY
vs.
UNITED STATES.

Amended Petition.

Comes the plaintiff, and after leave obtained, amends her petition filed March 2nd, 1905, as follows:

Strike out after the title of the cause all of paragraphs 1, 2, 3, 4, 5, 6, 7 and 8, and insert instead the following:

1. That she is a citizen of the United States and a resident of Cambridge in the County of Middlesex and Commonwealth of Massachusetts, and a single woman.

2. That she now has, and from the time of the taking by the United States of her property as hereinafter set forth, has had a just claim against the United States for the value of certain real estate, property, rights, privileges and easements appurtenant thereto, taken by the United States for public use, for the purpose of the erection, installment and use of a certain gun battery at Gerrish Island at Kittery Point in the State of Maine, known as Fort Foster, for which she has received no compensation from the United States.

3. Your petitioner further says, that on the 30th day of December in the year 1897, she became and now is, the owner of certain real estate, together with the rights, property, privileges and easements thereto belonging, situated at said Gerrish Island, by virtue of a certain deed of mortgage bearing date the 30th day of December, 1897,

from one S. Ellery Jennison, and one Mary M. Jennison,
3 his wife, which said deed of mortgage was duly signed, sealed, acknowledged, delivered and recorded in the Registry of Deeds for the County of York and State of Maine, on the 31st day of December, 1897, in Book 488, p. 180, to which deed and its record reference is made for the source of her title to the land and said rights, property, privileges and easements, appurtenant thereto. Said mortgage has never been foreclosed and is still in full force and effect. The mortgage debt for which said deed was given as security has never been paid; said mortgage debt on February 20, 1905 was $12,000, which sum is still due, together with interest at 5 per centum per annum. A copy of said mortgage deed is found as Exhibit A in the original petition in this suit on pp. 5, 6 and 7, and reference is hereby made thereto.

4. And the plaintiff further avers, that on the land conveyed to her as aforesaid, there were at the time of said conveyance and now are, ten different edifices, consisting of a hotel called the Pocahontas and outbuildings connected therewith, a water tower, springs, ice

houses, three cottages, engine house, stables, barns and sheds, and a pier.

And the plaintiff further alleges, that the said Hotel Pocahontas was at the time of the alleged taking, a large frame structure, convenient for and capable of accommodating one hundred and fifty guests, erected for the purpose of summer residence and the accommodation of tourists; and there was connected therewith water works on the premises hereinbefore described; livery stables and a pier for the use of steamboats, a billiard hall and other accessories of a summer hotel, all of which were of very great value.

The cottages aforesaid were used for renting and were tributary to the business of said Hotel Pocahontas. Said hotel and cottages were erected at an expense of more than $50,000. The water tower aforesaid and pipes, reservoirs and wells, and four separate pumping stations furnish the supply for the hotel and buildings therewith, were erected at an expense of $15,000, and $15,000, and said land and buildings were of the value of $250,000. Said spring of water was of great value.

5. And your petitioner further avers, that said land is fast land and is not subject to any lawful rights of the United States above high-water mark. Said land is of great value, to wit, of the value of one hundred and fifty thousand dollars. And that at the date of the taking by the United States, as alleged herein, said lands and buildings, property and the rights, privileges and easements therein, were the private property of your petitioner and were subject to no right, title or interest of the United States, and no right, title or interest in said fast lands, and no property rights, privileges or easements have ever been claimed by the United States antagonistic to that of your petitioner, and said United States has never hitherto denied the title of your petitioner to said lands, buildings, property, rights, privileges and easements.

And your petitioner further avers, that the Pocahontas Hotel and all the other structures hereinbefore described, were erected and in use by her and her grantors prior to the alleged taking by the United States of the lands, privileges, property and easements.

6. And your petitioner further avers, that in the year 1900, the United States erected at a distance of about 1,000 feet in the rear of said Pocahontas Hotel, and the other buildings and structures hereinbefore mentioned, a certain structure known as Fort Foster, being a gun battery, and installed therein a battery of three ten-inch disappearing guns, said Fort Foster being a public work of the United States; and since said year 1900 the United States has continuously maintained said Fort Foster and does now maintain the same.

And your petitioner further avers, that said Fort Foster was erected at a great expense and was intended to be and is a permanent structure. And in addition to said battery of ten-inch disappearing guns, the United States erected and still maintains in said Fort Foster a certain other battery of guns of a smaller caliber, known as the water battery.

7. And your petitioner further avers, that it was and is a necessary part of the project of the erection and use of said Fort Foster

and the installation of said ten-inch disappearing guns, that the zone of fire of the same should include and does include all said land of your petitioner and all said Pocahontas Hotel and the other structures hereinbefore described. And said fort cannot be used for the purpose for which it was erected without the use by the United States of said lands, property, buildings, rights, privileges and easements appurtenant thereto.

8. And your petitioner further avers, that a necessary part of the scheme of building said Fort Foster and the installation of said ten-inch disappearing guns, was and is, that said fort should be occupied by officers and soldiers of the United States and that said guns should be fired from time to time in time of peace, for calibration and preliminary and record practice; and should be fired from time to time in time of peace and at all times, for practice, in order that the same should be ready at any time and all times for the purpose for which said fort was erected; and said practice is necessary to enable said officers and soldiers to acquaint themselves with the mechanism and use of said guns and to acquire a proficiency in aiming and firing said guns by firing at targets or other objectives off the coast of said Gerrish Island, where an enemy's vessel might come for the purpose of destroying or injuring the other forts of the United States, at the mouth of the said Piscataqua River, the Navy Yard of the United States at Kittery, Maine, the City of Portsmouth, New Hampshire, and the bridge across said Piscataqua River, connecting the States of New Hampshire and Maine, and property of citizens of the United States.

9. And your petitioner further avers, that the trajectory of shots fired from said guns at objectives, ranging from 1,500 to 10,000 yards, off the coast of said Gerrish Island, within the radius of fire of said guns in time of peace, is necessarily projected and intended by said United States in the building of said Fort Foster and the installation of said guns, includes and was intended to include said Pocahontas Hotel and all of the buildings hereinbefore mentioned, or that might be erected on the premises.

10. And your petitioner further avers, that the project, intention and plan of building said Fort Foster and the installation of said guns was intended and does intend the use of the guns in time of peace, at ranges of from 1,500 yards to 10,000 yards, and that the sphere of concussion of said guns, includes and was intended to include the said Pocahontas Hotel and other buildings hereinbefore mentioned, or that might be erected.

11. And your petitioner further avers, that the firing of shot from said ten-inch guns over and across the premises of your petitioner and the concussion of the same for practice or other purposes, in time of peace and all times, interferes and circumscribes the lawful use by your petitioner of said Pocahontas Hotel and other buildings hereinbefore mentioned, so that the same are practically destroyed and their value is materially impaired, and at no reasonable expense can she prevent this injury.

12. And your petitioner further avers, that in the year 1900 continuously, and now continuously, the United States in the exercise

of its rights of eminent domain under the Constitution of the United States and by authority of acts of Congress duly empowering its officers and agents thereto, took said lands, property, rights, privileges and easements, and the right, privilege and easement to use in time of peace and at all times, to fire said ten-inch guns at any radius and at any elevation off the coast of said Gerrish Island, with concussion to said Hotel Pocahontas and any other structure hereinbefore mentioned, for practice and other purposes, which said firing and concussion was a part of the scheme of building said Fort Foster and the installation of said ten-inch guns as herein set forth, and to continue such firing and concussions, and to practically destroy and materially impair the value of the same, and to circumscribe and interfere with the exclusive use by the plaintiff of her said land, rights, property, privileges and easement; and your petitioner further avers that such firing and such concussion does produce the damage and injury aforesaid.

13. And your petitioner further avers, that in pursuance of the scheme involved in the taking as set forth in the preceding paragraph, the United States by its officers and soldiers on or about the 22nd day of June, 1902, and in the forenoon of said day, fired one of said ten-inch guns with shot across the land of said plaintiff at a target off the coast of said Gerrish Island, and in the afternoon of said day repeated the same act; and on or about September 25th of the same year, again repeated the same act; all of said firings being in time of peace; and said firings caused the foundation walls of said Hotel Pocahontas to bulge and a large number of windows of said hotel and other structures to break, and destroyed property inside said hotel, and caused fright to guests of said hotel.

And your petitioner further avers, that on many occasions since the alleged taking, and hitherto, the said officers and soldiers, have manipulated said ten-inch guns by raising the same and aiming at the said Pocahontas Hotel and the other buildings hereinbefore mentioned, as if to fire the same, thus causing apprehension to the owners of said property because having received no notice of the proposed action, they assumed that the said officers and soldiers were about to fire said guns with shot, as they had, as hereinbefore mentioned and your petitioner further avers that the concussion of firing said guns with blank cartridges would produce the same damage as described in the preceding paragraph.

And said plaintiff further avers, that the repetition of said firing of said guns in any and all directions, would make permanent the damage by concussion on said plaintiff's property and thereby permanently destroy its use, in time of peace and at all times.

14. And your petitioner further avers, that at the time of the firing said guns as set forth in the last paragraph, the United States had fully completed the erection of said ten-inch guns, with the exception of any other guns which it might thereafter determine to install in said Fort Foster.

15. And your petitioner further avers, that the reasonable compensation to her by the act of taking said lands, property, rights, privileges and easements, is four hundred thousand dollars.

16. And your petitioner further avers, that she is the owner of the whole claim here mentioned and described, and that she has made no assignment or transfer of the same or any interest therein and that she has at all times borne true allegiance to the United States and in no way aided or given encouragement to rebellion against the Government of the United States, and that she is justly entitled to recover from the United States the amount here claimed, after allowing all just credits.

17. Wherefore, your said petitioner prays that this Honorable Court will find that there is due to said petitioner the sum of four hundred thousand dollars, together with such other and further order and findings of law and fact as may in the premises be warranted by and in conformity with law.

COTTON & WHITE,
Attorneys for Plaintiff.

9 Personally appeared before me, John B. Cotton, one of the attorneys for the claimant and makes oath that the facts herein stated are true to the best of his knowledge and belief.

JOHN B. COTTON.

Sworn and subscribed before me this 20th day of December, 1907.
[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

* * * * * * *

EXHIBIT "A" OF ORIGINAL PETITION.

Know all men by these Presents, That I, Frederick M. Sise, of Portsmouth, in the County of Rockingham and State of New Hampshire, in consideration of one dollar paid by Samuel Ellery Jennison, of Kittery and County of York, Maine, the receipt whereof is hereby acknowledged, do hereby bargain, sell and convey, remise, release and forever quitclaim unto the said Samuel Ellery Jennison, his heirs and assigns, all that tract or parcel of land lying in the southwesterly part of Gerrish Island, in said town of Kittery, known as the "Seaward Farm," containing about two hundred acres, be the same more or less, with all the buildings and structures thereon.

Also, a certain lot of salt marsh in the easterly part of said Gerrish Island, containing about six acres;

Being the same premises described in a deed to me of the same date herewith and herewith to be recorded, from Mary M. Jennison and the said Samuel; excepting out of said premises the same lots or parcels in said deed mentioned as having been conveyed therefrom. Together with all rights of way, easements and privileges to the premises belonging, and subject to all reservations, rights, easements and privileges, and to the mortgages in said deed to me referred to.

To have and to hold the above released premises, with all
10 the privileges and appurtenances to the same belonging, to the said Samuel Ellery Jennison, his heirs and assigns, to his and their use and behoof forever.

In witness whereof I, the said Frederick M. Sise, have hereunto set my hand and seal this thirty-first day of July, in the year of our Lord one thousand eight hundred and ninety-three.

FREDERICK M. SISE. [SEAL.]

Signed, sealed and delivered in presence of us,
CALVIN PAGE.

——— ———.

STATE OF NEW HAMPSHIRE,
Rockingham, ss:

JULY 31, 1893.

Then personally appeared the above named Frederick M. Sise and acknowledged the above instrument to be his free act and deed. Before me,

CALVIN PAGE,
Justice of the Peace.

Recorded according to the original received August 7, 1893, at 3 h. 15 m. P. M.
Attest:

JUSTIN M. LEAVITT, *Register.*

STATE OF MAINE,
York, ss:

REGISTRY OF DEEDS.

A true copy as recorded in Book 158, page 316.
Attest:

HOWARD BRACKETT, *Register.*

The petitions in 27,501, and 27,503, are substantially in the same words and are omitted by agreement of counsel.

CLAIMANTS' EXHIBIT B.

Know all men by these presents, That I, Samuel Jennison, of the City of Boston, in the County of Suffolk and Commonwealth of Massachusetts, in consideration of one dollar and other good and valuable considerations, paid by Samuel Ellery Jennison, of said Boston, the receipt whereof I do hereby acknowledge, do hereby remise, release, bargain, sell and convey, and forever quitclaim unto the said Samuel Ellery Jennison, his heirs and assigns, all the following described premises with *heirs and assigns forever*, all my right, title and interest in and to the same, namely, all that tract and parcel and parcels of land known as the "Seaward Farm" on Gerrish's Island in the town of Kittery in the County of York and State of Maine, containing two hundred acres, more or less, with all the buildings, erections and improvements thereon; excepting and reserving a certain parcel or lot known as the "Family Burying

Ground," as in the deed to me, hereinafter referred to, from Chas
Burnham. Also a lot of salt marsh near Sea Point, on the easter
side of said Gerrish's Island, containing about six acres, togeth
with all the right, title and interest, claim and estate of eve
nature I may have in and to any other parcel or parcels
land on said Gerrish's Island, and in and to the shore
beaches, flats, bays and inlets adjacent, connected with and belon
ing to any of the premises, and together with all rights of way, ea
ments, privileges and appurtenances thereto belonging, incident
or anywise appertaining. Meaning and intending hereby to co
vey all the same premises which were conveyed to me by the de
of Choate Burnham dated May 5, A. D. 1883, and recorded in th
Registry of Deeds, for said County of York, in Book 382, page 13
the deed of Allan W. Burnham, Guardian, dated May 12, 1883,
corded in said Registry in Book 382, page 210, and of Allan W
Burnham and wife, dated May 22, 1883, recorded in Book 382, pa
211, in said Registry, to all which deeds and records reference m
be had for more particular description of the premises. The pre
ises are hereby conveyed subject to a mortgage made by the grant
hereto to said Choate Burnham dated May 5, 1883, which mortga
and the indebtedness thereon remaining unpaid the grantee here
agrees to assume and pay.

To have and to hold the same, together with all the privile
and appurtenances thereunto belonging, to the said Samuel Ellery
Jennison, his heirs and assigns, forever.

And I do covenant with the said Samuel Ellery Jennison, hei
and assigns, that I will warrant and forever defend the premises
him, the said Samuel Ellery Jennison, his heirs and assigns, fo
ever, against the lawful claims and demands of all persons claimi
by, through or under me.

In witness whereof I, the said Samuel Jennison, being unmarried
have hereunto set my hand and seal, this eighth day of February
in the year of our Lord one thousand eight hundred and eighty-four

SAMUEL JENNISON. [L. S.]

Signed, sealed and delivered in presence of
CHAS. HALL ADAMS.

STATE OF MASSACHUSETTS.
County of Suffolk, ss.

On this ninth day of February, A. D. eighteen hundred and
eighty-four, before me, Chas. Hall Adams, Commissioner of the
State of Maine residing in the State of Massachusetts, personally
came the within named Samuel Jennison and acknowledged the
within instrument to be his free act and deed. In witness whereof
I have hereunto set my hand and official seal at my office, No. 1
Court Street, in the City of Boston, in the County of Suffolk afore
said, the day and year in this certificate above written.

[L. S.] CHAS. HALL ADAMS,
Commissioner for Maine.

Recorded according to the original received March 17, 1884, at 2 h. 45 m. P. M.

Attest:

JUSTIN M. LEAVITT, *Register.*

STATE OF MAINE,
York, ss.

REGISTRY OF DEEDS, *March* 30, 1909.

A true copy as recorded in Book 386, page 237.

Attest:

HOWARD BRACKETT, *Register.*

12 III. *Original Petition Filed March 2,* 1905.

In the Court of Claims, March, 1905.

No. 27501.

SACO AND BIDDEFORD SAVINGS INSTITUTION

vs.

THE UNITED STATES.

To the Honorable the Court of Claims:

The Saco and Biddeford Savings Institution, a corporation, alleges:

1. That it is a corporation duly established by law at Saco in the County of York and State of Maine, where it has its principal place of business. That it is a citizen of the United States.

2. That it now has and from the time of the alleged taking by the United States of its property as hereinafter set forth, it has had a valid claim against the United States for the value of certain real estate hereinafter set forth, taken by the United States for public use, namely, for the purpose of the erection and the installment of a lighthouse on Goose Rocks Island in Kittery in the County of York and State of Maine, for which it has received no compensation from the United States.

3. Your petitioner further says that on the 22nd day of January in the year 1900 it became the owner of certain real estate situated on Goose Rocks Island in the said County of York and State of Maine, by virtue of a certain deed of mortgage bearing date the said 22nd of January, 1900, from one Samuel E. Jennison, which said deed of mortgage was duly signed, sealed and delivered, and is recorded in the Registry of Deeds for said York County on the 7th day of February, 1900, in book 500, page 331, to which said deed and its record reference is hereby made for the source of its title to the land set forth in the next paragraph thereof. A copy of said Deed is marked Exhibit "A" and made a part of this petition. Said mortgage has never been foreclosed and is still in full force and effect.

4. Said tract of land is more particularly described and bounded as follows:

The farm on Gerrish Island in Kittery, York County, Maine, known as the "Seaward Farm" containing one hundred and fifty-five acres, more or less, and bounded thus:

Beginning at an iron bolt set in stone at the seashore on the easterly line of land of G. H. Hightee; thence running northerly by said Hightee's land to the highway; thence from the northerly line of said way indicated by stone posts northerly and parallel with the westerly boundary of said Hightee's land to the "Government Reservation"; thence easterly by said reservation and lands of Joanna E. McClure, heirs of Edward F. Safford, Jos. B. Warner, heirs of F. C. Stimney, Wm. C. Williams, and heirs of William H. Goodwin, thence extending southerly by land of said Goodwin heirs to the Atlantic Ocean; thence extending westerly by said ocean to the point of beginning, excepting therefrom lots sold to H. N. Van Dyke, Susanna Willard, et al., and Olivia M. Flagg; also the town way extending through the same.

Said tract of land contains about one hundred and seven acres and is laid out in building lots suitable for the erection of buildings and cottages for persons desiring homes at the seashore, and is accessible by railroads and steamboats, and contains six houses, barns, sheds, pumping station, etc. Said lots of land can be connected with suitable water supply by the works of the Portsmouth Harbor Land & Hotel Company, [illegible] in connection with the hotel building known as the "Hotel Pocahontas" situated on land next immediately west of the above-described premises. Said tract is laid out into suitable building lots with streets and commands an unobstructed view of the waters of the Atlantic
14 Ocean and the mouth of the Piscataqua River, and the place is of great value, to wit, the sum of $270,000.

5. And your petitioner further shows that for several years continuously from the year 1900, and now continuously, the United States in the exercise of its power of eminent domain and under the Constitution of the United States and of authority of Acts of Congress duly empowering its officers and agents thereto, took said land and continuously since has been erecting, building and maintaining on land westerly and contiguous to the land on which is situated said Pocahontas Hotel a certain gun battery known as Fort Foster, in which it has installed three disappearing guns so-called, which said battery has been erected and maintained in the rear of said Pocahontas Hotel about one thousand feet therefrom.

6. And your petitioner further avers that it was necessary and a part of the project of the erection and maintaining of said Fort Foster and the guns aforesaid and for the protection of the mouth of the Piscataqua River from invasion by a foreign enemy in time of war, that the zone of fire of said guns so installed, and which may be hereafter installed, in furtherance of the scheme of building said Fort Foster should include the entire land of your petitioner aforesaid, and it avers that the range of fire of said guns so installed at Fort Foster does in fact cover the entire property of your petitioner.

7. And your petitioner further shows that the acts of the United

States as aforesaid have been done and are being done lawfully by the officers and agents of the United States under the authority of the United States in the exercise of its powers of eminent domain and regulation of commerce under the Constitution of the United States and the laws of Congress for the public purpose of the defense of the mouth of the Piscataqua River and of the docks of the United States erected on said River above Fort Foster, and of the City of Portsmouth, situated above Fort Foster, and navy yard of the United States situated at said Kittery.

15 8. And your petitioner further avers that in the year 1902 the officers and agents of the United States having lawful charge of said Fort Foster and for the purpose of necessary practice in the use of said guns installed in said Fort first fired the same and that the zone of said fire covered the entire premises of your petitioner as hereinbefore set forth, so that the same has become of little or no value.

9. That said petitioner is the owner of the claim herein mentioned and described; that no assignment or transfer of said claim or any part thereof or interest therein has been made to any person whatever, and that said claimant has at all times borne true allegiance to the United States Government, and in no way aided or abetted or given encouragement to rebellion against the Government of the United States, and that said claimant is justly entitled to have judgment for and recover from the United States the amount herein claimed, after allowing all just credits and set offs.

Wherefore your petitioner prays that this honorable court will find that there is due to said claimant the sum of $250,000, together with such other and further relief and findings of law and fact as may in the premises be warranted by and in conformity with law.

Dated this 21st day of February, A. D. 1905.

(Signed) SACO & BIDDEFORD SAVINGS INSTITUTION, *Claimant*.
By ENOCH LOWELL, *President*.

COLTON & WHITE, *Attorneys*.

16 Know all men by these presents, that Samuel Ellery Jones of Kittery in the County of York and State of Maine, in consideration of twenty-two thousand dollars, paid by the Saco & Biddeford Savings Institution, a corporation established by law at Saco in the County of York, and State of Maine, the receipt whereof is fully acknowledged, do hereby give, grant, bargain, sell and convey unto the said Saco and Biddeford Savings Institution its successors and assigns the farm on Gerrish Island in Kittery, York County, Maine, known as the "Seaward Farm" containing one hundred and fifty five acres, more or less, and bounded thus:

Beginning at an iron bolt set in stone at the sea shore on the easterly line of the land of G. H. Higbee, thence running northerly by said Higbee's land to the highway, thence from the northerly line of said way bounded by stone posts northerly and parallel with the westerly boundary of said Higbee's land to the "Government Reservation", thence easterly by said reservation and lands

of Joanna E. McClure, heirs of Edward F. Safford, Jos. B. Warner, heirs of E. C. Spinney, Wm. C. Williams, and heirs of Wm. H. Goodwin; thence extending southerly by land of said Goodwin heirs to the Atlantic Ocean; thence extending westerly by said Ocean to the point of beginning, excepting the fifteen lots sold to H. N. Van Dyke, Susanna Willard, et al., and Olivia M. Flagg; also the town way extending through the same.

To have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof, to the said Saco & Biddeford Savings Institution, its successors and assigns, their heirs and assigns forever, to their use and behoof forever. And I do covenant with the said grantee, its successors and assigns, that I am lawfully seized in fee of the premises, that they are free from all incumbrances; that I have good right to sell and convey the same to the said Grantee to hold as aforesaid; and that I and my heirs shall *and* will warrant and defend the same to the said grantee, its successors and assigns forever, against the lawful claims and demands of all persons.

17 Provided nevertheless, That if the said Grantor, his heirs, executors or administrators, shall pay to the said Grantee, its successors or assigns the sum of Twenty-two thousand dollars in one year from the date hereof, with interest on said sum at the rate of six per centum per annum, payable semi-annually till the sum mentioned herein shall be fully paid, and shall pay all taxes and other assessments laid upon said property within one year from date of assessment thereof, and shall at all times keep said buildings insured, payable to said grantee, to the extent of the claim hereby secured, and shall repay to said grantee all sums it may pay for taxes, insurance, repairs and improvements upon said premises, and all expenses it may be incurred, of foreclosure of this mortgage with interest on said sums as aforesaid, then this deed, as also certain note bearing even date with these presents, given by said grantor, Samuel Ellery Jennison, to the said grantee to pay the said sum of $22,000 and interest at the time above said, shall both be void, otherwise shall remain in full force.

And the said mortgagor and covenants hereby enters into a year at the time in which this mortgage and the right of redeeming the premises, shall be forever foreclosed, by force of the statute in such case provided by statute for the foreclosure of mortgages of real estate.

In witness whereof, I the said Grantor, said Samuel Ellery Jennison, Mary M. Jennison, wife of the said Samuel Ellery Jennison, in testimony of her relinquishment of her right of dower, and all other rights, by descent or otherwise, in the above described premises have hereunto set our hands and seals this twenty-second day of January, in the year of our Lord One thousand Nine Hundred

SAMUEL ELLERY JENNISON [Seal.]
MARY M. JENNISON [Seal.]

Signed, sealed and delivered in presence of
MOSES A. SAFFORD.

STATE OF MAINE, *ss:*

JANUARY 22, 1900.

Personally appeared the above named Samuel Ellery Jennison and acknowledged the above instrument to be his free act and deed.

Before me.

[SEAL.] MOSES A. SAFFORD,

Notary Public.

Registry of Deeds, Rec'd Feb'y 7, 1900, at 9 h. 15 m. a. m. and Record on Book 501, page 331.

Attest:

JUSTIN M. LEAVITT, *Register.*

[illegible] STATE OF MAINE,

County of York, ss.

SACO, ME., *Feb'y* 21, 1905.

Enoch Lowell, being duly sworn, deposes and says that he is the President of said Saco & Biddeford Savings Institution, and that he has read said petition and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated upon information and belief, and as to those matters he verily believes the same to be true, and that he is lawfully authorized to sign the petition aforesaid.

Subscribed and sworn to before me this 21 day of February, A. D. 1905.

[SEAL.] MELVILLE H. KELLY,

Notary Public.

(Certificate attached of Clerk of Court as to Notary.)

STATE OF MAINE,

Office of the Secretary.

I, [illegible] Secretary of the State of Maine and Keeper of the [illegible] thereof, do hereby certify that [illegible] was on the [illegible] day of [illegible] duly appointed and commissioned a notary public in said State [illegible] the date of said commission until [illegible]. With authority under the laws of the State to administer oaths, take acknowledgments and depositions, and that to his acts and attestations as such full faith and credit are given and ought to be given in and out of court. I further certify that the foregoing [illegible] is in due form [illegible] by the proper officer, and I verily believe the signature of the said [illegible] thereto to be genuine.

In testimony whereof I have hereunto set my hand and affixed the [illegible] of said State, this [illegible] day of [illegible] A. D. 1905.

[SEAL OF STATE.] ——, *Secretary.*

[illegible] STATE OF MAINE.

I hereby certify that Melvin H. Kelly, Esquire, whose name is [illegible] upon the paper hereunto annexed, and whose signature thereto

I believe to be true and genuine as of the date thereof, a Notary Public within and for the County of York, duly commissioned and qualified, and that all his official acts as such are entitled to full faith and credit.

In Testimony whereof I have hereunto set my hand and affixed the Seal of the State at Augusta, this twenty-second day of February, 1905.

[SEAL.] A. T. BROWN,
Deputy Secretary of State.

20 IV. *Amended Petition — Filed January 16, 1908.*

In the Court of Claims, December Term, 1907.

No. 27502

SAMUEL ELLERY JENNISON
vs.
THE UNITED STATES.

Amended Petition.

Comes the plaintiff and upon leave obtained amends his petition filed March 4, 1905, as follows:

Strike out after the title of the cause all of paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 and insert the following:

1. That he is a citizen of the United States and a resident of Gerrish Island, Kittery Point, in the County of York and the State of Maine.

2. That he now has and from the time of the taking by the United States of his property as hereinafter set forth, has had a just claim against the United States for the value of certain real estate, property, rights, privileges and easements appurtenant thereto taken by the United States for public use for the purpose of the erection, installment and use of a certain gun battery at Gerrish Island, Kittery Point, in the State of Maine, known as Fort Foster, for which he has received no compensation from the United States.

3. Your petitioner further says that on the 1st day of July in the year 1893 he became and now is the owner of certain real estate together with the rights, property, privileges and ease-
21 ments thereto belonging, situated in Gerrish Island, Kittery Point, of a certain deed bearing date said 1st day of July, 1893, from one Fred M. Sise, which said deed was duly signed, sealed and delivered and recorded in the Registry of Deeds for said County of York, in Book No. 578, p. 316, to which said deed and its record reference is hereby made for the source of his title to the land and said rights, property, privileges and easements appurtenant thereto. A copy of said deed is marked Exhibit A in the original petition of this suit, and reference is hereby made thereto. * * *

4. And the plaintiff further says that on the land conveyed to

him as aforesaid, there were at the time of said conveyance and now are, ten different edifices, consisting of a hotel called the Pocahontas, and outbuildings connected therewith, a water tower, springs, ice houses, three cottages, engine house, stables, barns and sheds, and a pier.

And the plaintiff further alleges, that the said Hotel Pocahontas was at the time of the alleged taking, a large frame structure, convenient for and capable of accommodating one hundred and fifty guests, erected for the purpose of summer residence and the accommodation of tourists; and there was connected therewith water works on the premises hereinbefore described; livery stables and a pier for the use of steamboats, a billiard hall and other accessories of a summer hotel, all of which were of very great value.

The cottages aforesaid were used for renting and were tributary to the business of said Hotel Pocahontas. Said hotel and cottages were erected at an expense of more than $30,000. The water tower aforesaid and pipes, reservoir and wells, and four separate pumping stations, furnish the supply for the hotel and buildings connected therewith, were erected at an expense of $15,000, and said land and buildings were of the value of $250,000. Said spring of water was of great value.

3. And your petitioner further avers, that said land is fast land and is not subject to any lawful rights of the United States above high water mark. Said land is of great value, to wit, of the value of one hundred and fifty thousand dollars. And that at the date of the taking by the United States, as alleged herein, said land and buildings, property and the rights, privileges and easements thereon were the private property of your petitioner and were subject to no right, title or interest of the United States, and no right, title or interest in said fast lands, and no property rights, privileges or easements hereinafter claimed by the United States antagonistic to that of your petitioner; and said United States has never hitherto limited the title of your petitioner to said land, buildings, property rights, privileges and easements.

And your petitioner further avers that the Pocahontas Hotel and all the other structures hereinbefore described, were erected and in use by him and his grantors prior to the alleged taking by the United States of the lands, privileges, property and easements.

4. And your petitioner further avers, that in the year 1900, the United States erected at a distance of about 1,000 feet in the rear of said Pocahontas Hotel, and the other buildings and structures hereinbefore mentioned, a certain structure known as Fort Foster, being a gun factory, and installed thereon a battery of three ten-inch disappearing guns, said Fort Foster being a public work of the United States; and since said year 1900, the United States has continuously maintained said Fort Foster and does now maintain the same.

And your petitioner avers that said Fort Foster was erected at a great expense and was intended to be and is a permanent structure. And in addition to said battery of ten-inch disappearing guns, the United States erected and still maintains in said Fort Foster, a certain other battery of guns of a smaller calibre, known as the water battery.

pensation to him by the act of taking said lands, property, rights, privileges and easements, is Four Hundred thousand dollars.

16. And your petitioner further avers that he is the owner of the whole claim herein mentioned and described, and that he has made no assignment or transfer of the same or any interest therein and that he has at all times borne true allegiance to the United States and in no way aided or given encouragement to rebellion against the Government of the United States and that he is justly entitled to recovery from the United States, the amount herein claimed, after
27 allowing all just credits.

17. Wherefore your petitioner prays, that this Honorable Court will find that there is due to said petitioner the sum of Four hundred thousand dollars, together with such other and further order and findings of law and fact as may in the premises be warranted by and in conformity with law.

(Signed) COTTON & WHITE,
Attorneys for Plaintiff.

Personally appeared John B. Cotton, one of the attorneys who signed the above written petition, and made oath that the facts set forth therein are true according to his knowledge and belief.

(Signed) JOHN B. COTTON.

JANUARY 16, 1908.

Signed and sworn to before me the day and year above written.
[SEAL.] JOHN RANDOLPH,
Asst Clerk Court of Claims.

28 V. *Amended Petition. Filed January 16, 1908.*

In the Court of Claims, December Term, 1907.

No. 27503.

THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY
vs.
THE UNITED STATES.

Amended Petition.

Comes the plaintiff and after leave obtained, amends its petition filed March 3rd, 1905, as follows:

Strike out after the title of the cause all of paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 and insert therefor the following:

1. That it is a corporation duly established under the laws of the State of Maine and having its principal place of business at Kittery, County of York and State of Maine, and that it is a citizen of the United States.

2. That it now has and from the time of the alleged taking by the United States of its real estate, property, lands, privileges and ease-

ments thereto belonging, has had a just claim against the United States for the value of certain real estate, property, rights, privileges and easements appurtenant thereto, taken by the United States for public use, for the purpose of the erection, installment and use of a certain gun battery at Gerrish Island, at Kittery Point in the State of Maine, known as Fort Foster, for which it has received no compensation from the United States.

3. Your petitioner further says, that on the 20th day of August, in the year 1902, it became and now is, the owner of certain real estate, property, rights, privileges and appurtenants thereto belonging, situated on Gerrish Island in the town of Kittery, County of York and State of Maine, by virtue of a deed bearing date said 20th day of August, 1902, from one Samuel Ellery Jennison; which said deed was duly signed, sealed and acknowledged, delivered and recorded in the Registry of Deeds for said County of York, in Book No. 525, p. 293, to which said deed and its record reference is hereby made for the source of the title to the real estate, property, rights, privileges and easements aforesaid. A copy of said deed is marked Exhibit A and is found in the original petition in this case, to which reference is hereby made.

4. And your petitioner further avers, that said land is fast land and not subject to any lawful rights of the United States above high water mark. And that at the date of the taking by the United States, as alleged herein, said lands and buildings, property, rights, privileges and easements therein were the private property of your petitioner and were subject to no right, title or interest of the United States, and no right, title or interest in said fast lands, and no property rights, privileges or easements have ever been claimed by the United States antagonistic to that of your petitioner; and said United States has never hitherto denied the title of your petitioner to said lands, buildings, property, rights, privileges and easements.

5. And your petitioner further avers, that in the year 1900, the United States erected at a distance of about 1,000 feet in the rear of said lands and buildings hereinbefore mentioned, a certain structure known as Fort Foster, being a gun battery, and installed therein a battery of three ten-inch disappearing guns, said Fort Foster being a public work of the United States; and since said year 1900, the said United States has continuously maintained said Fort Foster and does now maintain the same.

And your petitioner further avers that said Fort Foster was erected at a great expense and was intended to be and is a permanent structure. And in addition to said battery of ten-inch disappearing guns, the United States erected and still maintains a certain other battery of guns of a smaller calibre, known as the water battery.

6. And your petitioner further avers that it was and is a necessary part of the project of the erection and use of said Fort Foster and the installation of said ten-inch disappearing guns, that the zone of fire of the same should include and does include all said land of your petitioner and all said buildings herein mentioned. And said fort cannot be used for the purpose for which it was erected without

the use by the United States of said lands, property, buildings, rights, privileges and easements appurtenant thereto.

7. And your petitioner further avers, that a necessary part of the scheme of building said Fort Foster and the installation of said ten-inch disappearing guns, was and is, that said fort should be occupied by officers and soldiers of the United States, and that said guns should be used for calibration and should be fired from time to time in time of peace and at all times, for practice, in order that the same should be ready at any time and all times for the purpose for which said fort was erected: and said practice is necessary to enable said officers and soldiers to acquaint themselves with the mechanism and use of said guns and to acquire a proficiency in aiming and firing said guns by firing at targets or other objectives off the coast of said Gerrish Island, where an enemy's vessel might come for the purpose of destroying or injuring the other forts of the United States at the mouth of the said Piscataqua River, the Navy Yard of the
31 United States at Kittery, Maine, the City of Portsmouth, New Hampshire, and the bridge across said Piscataqua River connecting the States of New Hampshire and Maine, and property of citizens of the United States.

8. And your petitioner further avers that the trajectory of shots fired from said guns at objectives, ranging from 1,500 to 10,000 yards, off the coast of said Gerrish Island, within the radius of fire of said guns in time of peace, as necessarily projected and intended by the United States in the building of said Fort Foster and the installation of said guns, includes and was intended to include, said land and buildings hereinbefore mentioned, or buildings that might be erected on the premises.

9. And your petitioner further avers that the project, situation and plan of building said Fort Foster and the installation of said guns was intended and does intend, the use of the guns in time of peace, at ranges of from 1,500 yards to 10,000 yards, and that the sphere of concussion of said guns includes and was intended to include the said lands and buildings hereinbefore mentioned or that might hereafter be erected.

10. And your petitioner further avers, that the firing of shot guns over and across the premises of your petitioner and the concussion of the same for practice or other purposes, in time of peace and at all times, interferes and circumscribes the lawful use by your petitioner of said land and buildings hereinbefore mentioned, so that the same are practicaly destroyed and their value is materially impaired and at no reasonable expense can it prevent the injury.

11. And your petitioner further avers, that in the year 1900 continuously, and now continuously, the United States in the exercise of its right of eminent domain under the Constitution of the United States and by authority of acts of Congress duly empowering its officers and agents thereto, took said lands, property, rights, privileges and easements, and the right, privilege and easement to
32 use in time of peace and at all times, to fire said ten-inch guns at any radius and at any elevation off the coast of said Gerrish Island, with concussion to said buildings hereinbefore mentioned for prac-

tice and other purposes, which said firing and concussion was a part of the scheme of building said Fort Foster and the installation of said ten-inch guns as herein set forth, and to continue such firing and concussion, and to practically destroy and materially impair the value of the same, and to circumscribe and interfere with the exclusive use by the plaintiff of its land, rights, property, privileges and easements; and your petitioner further avers that such firing and such concussion does produce the damage and injury aforesaid.

12. And your petitioner further avers, that in pursuance of the scheme involved in the taking as set forth in the preceding paragraph, the United States by its officers and soldiers, on or about the 22nd day of June, 1902, and in the forenoon of said day, fired one of said ten-inch guns with shot across the land of said petitioner at Calves Island off the coast of said Gerrish Islands and in the afternoon of said day repeated the same act; and on or about September 25th of the same year again repeated said act; all of said firings being in time of peace; and said firing caused the windows of said building hereinbefore mentioned, to break and to be otherwise injured.

And your petitioner further avers, that on many occasions since the alleged taking, and hitherto, the said officers and soldiers, have instituted said ten-inch guns, by raising the same and aiming at the said buildings hereinbefore mentioned, as if to fire the same, thus causing apprehension to the owners of said property, because having received no notice of the proposed action, they assumed that the said officers and soldiers were about to fire said guns with shot, as they had on hereinbefore mentioned, and your petitioner further avers that the concussion of firing said guns with blank cartridge would produce the same damage as described in the preceding paragraph.

And the plaintiff further avers, that the repetition of said firing of said guns in any and all directions, would make permanent the injury by concussion on said plaintiff's property and thereby permanently destroy its use in time of peace and at all times.

13. And your petitioner further avers that at the time of the firing said guns as set forth in the last paragraph the United States had fully completed the erection of said ten-inch guns, with the exception of any other guns which it might thereafter determine to install in said Fort Foster.

14. And your petitioner further avers that the reasonable compensation to it by the act of taking said lands, property, rights, privileges and easements, is Four Hundred thousand dollars.

15. And your petitioner further avers that it is the owner of the whole claim herein mentioned and described, and that it has made no assignment or transfer of the same or any interest therein and that it has at all times been true allegiance to the United States and in no way aided or abetted or given encouragement to rebellion against the Government of the United States and that it is justly entitled to recovery from the United States the amount herein claimed after allowing all just credits.

16. Wherefore your petitioner prays that this Honorable Court will find that there is due to said petitioner the sum of Four Hundred thousand dollars, together with such other and further

order and findings of law and fact as may in the premises be warranted by and in conformity with law.

(Signed) COTTON & WHITE,
Attorneys for Plaintiff.

Personally appeared John B. Cotton, one of the attorneys who signed the above written petition, and made oath that the facts set forth therein are true according to his knowledge and belief.

(Signed) JOHN B. COTTON.

JANUARY 16, 1908.

Signed and sworn to before me the day and year above written.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

35 VI. *Traverse. Filed November* 15, 1910.

In the Court of Claims of the United States, December Term, A. D. 1911.

No. 27500.

MARY R. PEABODY
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

In the Court of Claims of the United States, December Term, A. D. 1911.

No. 27501.

SACO & BIDDEFORD SAVINGS INSTITUTION
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

56 In the Court of Claims of the United States, December Term, A. D. 1911.

No. 27502.

SAMUEL ELLERY JENNISON
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

In the Court of Claims of the United States, December Term, A. D. 1911.

No. 27503.

THE PORTSMOUTH HARBOR LAND & HOTEL COMPANY
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

57 VII. *Argument and Submission of Cases.*

On the 15th day of November these cases came on to be heard. Mr. William Frye White was heard for the claimants and Mr. F. DeC. Faust was heard in opposition. On the 16th day of November Mr. Chauncey Hackett was heard in reply and the cases were submitted.

39 III.

Samuel Ellery Jennison was at the time of the alleged taking, and had been since July 31, 1893, the owner of certain land and improvements thereon on Gerrish Island, State of Maine, and more particularly described as follows:

"All that tract and parcel of land formerly known as the Seaward Farm on Gerrish Island in the town of Kittery, county of York, State of Maine, containing 200 acres, more or less, with all the buildings, structures, and improvements thereon, and bounded as follows, to wit: Beginning at the easterly end of Gerrish Island at the [illegible] and southerly boundary of the United States Government [illegible] reservation, thence running easterly by the line of said reservation and the lands of James L. McClure, of the heirs of Edward [illegible] Safford, of Joseph B. Warner, of the heirs of Ephriam C. [illegible], of William G. Williams and of the heirs of William M. [illegible], thence southerly by the land of the heirs of William M. [illegible] to the Atlantic Ocean; excepting and reserving from the [illegible] described, however, certain lots which have heretofore been conveyed therefrom to George H. [illegible], to Henry N. [illegible], to [illegible] Willard, to [illegible] Flagg and to William [illegible] White."

IV.

The tract was acquired by Jennison by a deed dated February 8, [illegible], and by him conveyed to Mary M. Caston, whom he subsequently married. On July 31, 1893, his wife conveyed to Frederick [illegible], who on the same date conveyed the whole tract to Jennison. On December 30, 1897, Jennison mortgaged to the claimant, Mary B. Peabody, 20 acres of the tract to secure a debt of $12,000, [illegible] Savings Institution the remainder of the [illegible] a debt of $22,000.

On August 20, 1902, Jennison conveyed the entire tract, subject to the above mortgages, to the Portsmouth Harbor Land and Hotel Company, a body corporate, organized under the laws of the State of Maine.

V.

The claimant's land comprises 200 acres of land, of which 179 [illegible] acres are above high-water mark.

VI.

At the time of the alleged taking there were on the land owned by the claimant the following structures and additions to the natural advantages: On the westerly end of the tract there were the Pocahontas Hotel and buildings [illegible] thereto, consisting of a water tower, windmill, [illegible], two help cottages, an engine house, stable, carriage house, shed, bath houses, and steamboat pier. Farther to the east were several cottages, as follows: Rock Ledge, cottages called the [illegible], [illegible] Pinecroft, Moorings, and the homestead, sometimes called the Seaward, and the farmhouse, sometimes called the Primrose Cottage. Near the Seaward was a

stable, and near the turnabout was a great barn, blacksmith-shop, small boathouse, and a hennery. There was also a water-supply system, which had been installed by the claimants which supplied water for drinking and other purposes from the spring-fed pond.

VII.

The land borders on its southern and eastern front the Atlantic Ocean, and on its western front the entrance to Portsmouth Harbor. It forms the southern corner of Gerrish Island, itself the southernmost point on the coast of Maine. The land consists of open grassy spaces, combined with woods of evergreen and hard wood. The shore is rocky, interspersed with sand beaches, and inland the land slopes up gradually. That part not occupied by cottages is available for building purposes. Nearly all the parts of the tract have an unobstructed view of the ocean. There is an excellent bathing beach near the hotel.

The island is well watered. There is a pond near the highway, about a quarter of a mile from the hotel. There is another pond near the road from the homestead, about one-third of a mile from the sea. The former is about 500 feet square and is fed by springs and rain from watershed, and provides ice. There is an excellent spring near the hotel.

Gerrish Island and the land of the claimants is about 2 miles from Portsmouth. The hotel is about a mile and a half from the electric line which runs from Portsmouth to York Beach and other popular and seashore resorts. The railroad station of the York Harbor and Beach Railroad, a leased line of the Boston and Maine Railroad, is about a mile and a half from the hotel. The land of the claimants has good roads, which have been constructed by the claimants. The outlook from the premises is over the ocean and by the New Hampshire coast across the harbor. There is fishing and facilities for bathing, sailing, riding, and driving. Also a place for golf.

The island is connected with the mainland by an iron bridge and a wooden bridge, both highway bridges.

VIII.

The land of the claimants was suitable for summer residences or for a summer resort and was otherwise of little value, and at the time of the alleged taking was used for a summer hotel and had several cottages thereon occupied as summer residences.

IX.

At the time of the alleged taking of the said lands of the claimants the fair value thereof, including the improvements thereon, was $200,000, and there was situated thereon the Pocahontas Hotel which yielded the claimants a net profit of about $5,000 per annum. For the years 1903 and 1904 there was a loss to the claimants in the conducting of said hotel. Since 1904 the hotel has been closed. At said time the cottages thereon situated were all rented for the summer season at reasonable rates of profit. Since that time the

claimants have only rented a portion of said cottages during each summer season and at reduced rates compared with previous years. The value of the land which was actually fired over by the guns of said fort as herein found, does not appear.

X.

About one-third of the said lands of the claimants lies immediately between said military reservation and the sea toward the south and the balance lies remotely between said reservation and the sea toward the east.

XI.

By the act of February 24, 1873 (17 Stats., 468), Congress appropriated "for batteries in Portsmouth Harbor, Portsmouth, New Hampshire, on Gerrish Island and Jerry Point, fifty thousand dollars," and by the acts of April 5, 1874 (18 Stats., 25), and February 20, 1875 (18 Stats., 333), $30,000 and $20,000 additional, respectively, for the same purpose. Under the authority thus conferred the United States on May, 1873, purchased a tract of land containing 70 acres, more or less, south and west of and abutting upon the claimants' land, and began to construct thereon, in June, 1873, a 12-gun battery, estimated to cost $15,200, under the supervision of the Chief of Engineers of the United States Army. This battery, with the one opposite on Jerry Point, formed the outer line of defenses to Portsmouth Harbor and to the navy-yard at Kittery. In 1876 the work had reached an advanced stage of construction and $30,000 had been expended thereon. The breast-height walls of the fortification were finished and the gun platforms were built except laying the irons. Operations were closed in September of that year, however, for want of funds, and said fortification was not resumed by the defendants thereafter until work was resumed thereon as hereinafter stated.

Plans were subsequently prepared for the completion of the work and an appropriation of $50,000 requested for this purpose during each fiscal year from 1877 to 1885 in the annual reports of the Secretary of War. No appropriation was made, however, nor was said unfinished fortification until after the passage of the act of May 7, 1898 (30 Stats., p. 1001), "making an appropriation for fortifications and other works of defence, for the armament thereof, and for the procurement of heavy ordnance for trial and service, and for other purposes," when allotment was made and the work of constructing a battery consisting of three 10-inch guns mounted on disappearing gun carriages and two 3-inch rapid fire guns was begun in September, 1898. This battery was located on the site of the former unfinished battery commenced in 1873, which had been designed to contain nine guns with an angular field of fire greater than that provided for the guns of Battery Bolden. The work was practically completed on June 30, 1901, and was transferred to the military on December 16, 1901, and named "Fort Foster." No part of said fort encroaches upon the abutting land of the claimants. Said fort is located within 200 feet of the northwest corner of the claimants' land and about 1,000 feet from said

Hotel Pocahontas. At the time of the reconstruction of said Fort Foster as stated the hotel and cottages before mentioned were already built and in operation.

XII.

The said guns installed in said fort have a range of five over and across all of the sea front of the lands of the claimants. At the dividing line between the claimants' land and the government reservation between high and low water mark is a continuation in the same direction of the undisputed dividing line between said premises above high-water mark, the guns of said Fort Foster can not be fired toward the sea without the projectiles from the same passing over and across the claimants' land.

If, however, said dividing line between high and low water mark from the point of termination of the undisputed dividing line at high-water mark is a line bisecting the angle formed by lines diverging from said point of termination ascertained by the application of the following rule:

Draw a base line from the two corners of the claimants' land and the government reservation, respectively, where they strike the shore and from corners extend parallel lines to low water mark at right angles with the base lines;

the guns of said Fort Foster may be used for practice and for all other necessary purposes in time of peace without the projectiles from the same passing over or across the claimants' land. The most suitable field for firing the guns of the battery in time of peace for practice or other purposes would be over the claimants' land.

XIII.

The Government by its officers and men did on or about the 23d day of June, 1902, fire two of its said guns for the purpose of testing them at a target off the coast and in such a direction that the projectiles therefrom went over and across said lands of the claimants, and fired another of its said guns for the same purpose and to the same effect on the 25th of September, 1902, the effect of such firing being to do damage by concussion to the said lands of the claimants and the furniture therein, to the extent of $150.

None of these guns have been fired since that time, but since the installation they have been kept in good condition and ready for use from Fort Constitution situated just across the Piscataqua River.

XIV.

It does not appear from the evidence that there is any intention on the part of the Government to fire any of its guns now installed or which may hereafter be installed, at such fort in time of peace over and across the lands of the claimants so as to deprive them of the use of the same or any part thereof or to injure the same by concussion or otherwise, excepting as such intention can be drawn from the fact that the guns now installed in said fort are so fixed as to make it possible so to do and the further fact that they were so fired upon the occasions as hereinbefore found.

XV.

The value of said real estate consists almost entirely in its adaptability and desirability as a summer resort and for the erection and maintenance thereon of summer hotels and cottages for occupation during the summer season, and the erection of said Fort Foster contemplated and the installation therein of said guns has materially impaired the value thereof, and said impairment will continue so long as said fort and said artillery thereon are maintained. Said impairment of value consists in this, viz.: probable guests for the hotels which now are or may be hereafter erected thereon, or probable lessees or occupants of the cottages which now are or hereafter may be erected thereon, or probable purchasers of any of said lands for summer resort purposes will apprehend that said artillery may fire in time of peace over and across said lands or some portion thereof so as to create a disturbance which will destroy its desirability for quietude and by reason thereof materially damage to the buildings which may be erected thereon.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimants are not entitled to recover, and their petitions are thereupon dismissed.

Opinion.

RICHEY, J., delivered the opinion of the court:

The above suits have been consolidated by stipulation, and for the purposes of this decision will be treated as one case. In fact, we see no reason why they were not originally brought as one case.

These suits are to recover compensation for property alleged to have been taken by the United States in the exercise of its power of eminent domain, for which no compensation has been made pursuant to the fifth amendment of the Constitution.

The original petition in the suit was demurred to by defendants, and this demurrer was sustained by the court. (Peabody *v.* United States, 31 C. Cls. R., 230.) Pursuant to leave granted the petition was amended, evidence was submitted, and the whole case is now before the court for its decision upon the merits.

The case, as to the claimants, as appears from the findings, is as follows: In the month of May, 1873, the Government purchased a tract of land containing about 70 acres on what is known as Gurnish Point, which is located on the extreme southwest extremity of the State of Maine, at the mouth of the Pas-sa-quan River, and is only separated from the mainland at high water by a narrow inlet. In the following year it began the erection of a battery on this reservation, and continued operations to that end until about the year 1876, up to which time about $70,000 had been expended in the work. It does not appear that up to the latter date any guns had been installed

in the battery, and the work seems to have been abandoned or neglected until 1898, when an allotment was made for the completion of this battery, and in pursuance thereto a battery consisting of three 10-inch guns was constructed on the old site. This battery was completed about June 30, 1901, and named "Fort Foster" and is a part of the defenses of Portsmouth Harbor, which begins at the mouth of the Piscataqua River.

In 1887 the claimant Jennison became the owner of about 200 acres of land on Garrish Island, situated south and west of the government reservation and fronting about 1 mile on the Atlantic Ocean. This land is peculiarly adapted for use as a summer resort on account of its shore front, bathing beaches, timber, springs, etc., and is otherwise of little value. The next year Mr. Jennison began the erection of a summer hotel thereon called the Pocahontas, which has been added to from time to time since, till at the time of the alleged taking it contained ninety guest rooms and had cost about $50,000. He has also built and furnished several cottages on this land to rent during the summer season at a cost of about $15,000. This hotel and the cottages had been yielding Mr. Jennison considerable profit for several years prior to the alleged [illegible] taking of the land by the Government. The hotel and cottages were built and in operation for some years before the reconstruction of Fort Foster was started, and the fort is located within 200 feet of the northwest corner of the claimants' land and within 1,000 feet of the hotel.

In the month of June, 1902, the soldiers stationed at Fort Foster fired two of the guns there installed, for the purpose of testing the same, over and across the premises of Mr. Jennison at a target located several miles off the shore, and fired the other gun in the same manner in the month of September following. The effect of this firing, by way of concussion, was to do considerable damage to the hotel and cottages by disturbing the foundation of the hotel, breaking glass, etc. None of these guns have since been fired, but they are kept in constant condition by a detail from a neighboring fort.

It appears from the findings that the erection of this fort and the installation therein of said guns in the manner stated has materially impaired the value of claimants' land by standing as a constant menace to its quietude as a summer resort and thereby keeping from it probable guests and purchasers. The question then before us is: Whether such impairment of value brought about in the manner stated is a "taking" of the property of the claimants within the fifth amendment of the Constitution?

In an attempt to make the averment in the amended petition in this suit set forth a taking of claimants' property within the meaning of the law, the substantial statement in that regard is that it was and is the intention and plan of the Government to fire the guns of Fort Foster over and across the premises of the claimants for practice and other purposes, and that none of said guns can be so fired for any effective purpose without the projectiles from the same passing over the claimants' intervening land, and evidence has been furnished to sustain this averment.

The findings show and there appears to be no dispute upon this

No. 695
Penhrynedd

subject) that if the dividing line between claimants' land and the government reservation between high and low water mark is a continuation in the same direction of the undisputed dividing line between said premises above high-water mark, the guns of this fort can not be fired toward the sea without the projectiles therefrom passing over and across claimants' land. On the other hand, however, the findings show that if the undisputed boundary line between the claimants' and the Government's land terminates at high-water mark, and the boundary line between them from said point to low water is the line bisecting the angle formed by two lines drawn from said point to low-water mark, one at a right angle to a base line drawn between the two extreme points where the claimants' land touches the shore line at high water, the other at a right angle to a base line drawn between the two extreme points where the Government's land touches the shore at high water, the guns of said Fort Foster may be fired for practice and for all other necessary purposes in time of peace without the projectiles passing over and across claimants' land.

Hence the settlement of the location of this boundary line may be considered as decisive of this case. The law of the State of Maine as to boundary lines of contiguous proprietors between high and low water mark of course must be looked to in order to settle this question. (St. Anthony Falls Water Power Co. v. Water Commissioners, 168 U. S., 358, 389.)

The Colonial Ordinance of 1641 provides that the coast line of all lands in the State of Maine shall be the line of low-water mark, and while the ordinance makes no express provision for it, the courts of Maine appear to have decided that under this ordinance the flats lying between high and low water mark must be equitably divided between adjacent owners. It will readily be seen without illustration that such equitable divisions in many cases would not be effected by an extension over the flats of the lines bounding the uplands, as some of them might be so oblique as to almost entirely deprive some of the riparian proprietors of any part of the ocean beach. This question came before the courts of Maine many years ago, and the following rule as to such subdivisions was adopted:

To divide flats between adjoining riparian proprietors, draw a base line from one corner, at high-water mark, of each lot to the other, and run a line from each end of this line at right angles to low-water mark. If, by reason of the curvature of the shore, the lines diverge or conflict with each other, the gain or loss is to be divided equally between adjoining lot owners by bisecting the angles made by the diverging or conflicting lines. (3 Farnham on Waters, 2484; Emmerson v. Taylor, 9 Maine, 42; Call v. Carroll, 10 Maine, 31; Dillingham v. Roberts, 77 Maine, 284.)

The following map will show the application of this rule to this case.

(Here follows map marked p. 46.)

The red line A-B represents the base line drawn from where claimants' and Government's land terminates at high-water mark to the point where claimants' next dividing line terminates at high water. The red line A-C represents the base line of the same character relating to the government reservation. The blue lines A-D and A-E are drawn at right angles from said base lines and form the angle which bisected by the dotted line A-F gives the boundary line of the government reservation and claimants' land between high and low water mark. If said boundary line were a continuation in the same direction of the dividing line between said premises, the same is substantially indicated by the blue line A-E, angling, however, a little too far to the south.

It will thus be seen that under this rule the Government is the proprietor of that part of the flats situated to the west of line A-F, which the findings show is sufficient territory over and across which to fire the guns at Fort Foster for practice or any other purpose in time of peace. Such being the case, it can hardly be contended that the firing of these guns, each of them once, in another direction so as to send the projectiles over the claimants' land constitutes a "taking" of their property. We can only judge of what property, if any, the Government has designed to have taken by that over which it has asserted some dominion, or from the possession or enjoyment of which it has actually deprived the owner. If the single discharge of its guns over the lands of the claimants caused them any damage, as it doubtless did, it was a loss over which, as against the Government, this court and no court has any jurisdiction.

The presence of Fort Foster and the probability and perhaps certainty that at times the guns there installed will be fired in time of peace for practice, and that such firing by concussion will injure the property of the plaintiffs, as well as disturb the quietude of summer resorters in its locality, is but consequential damage for which the Government is not liable.

Hence the petition is dismissed.

47 IX. *Judgment of the Court.*

No. 27500.

MARY R. PEABODY
vs.
THE UNITED STATES.

No. 27501

SACO AND BIDDEFORD SAVINGS INSTITUTION
vs.
THE UNITED STATES.

No. 27502.

SAMUEL ELLERY JENNISON
vs.
THE UNITED STATES.

No. 27503.

PORTSMOUTH HARBOR LAND AND HOTEL COMPANY
vs.
THE UNITED STATES.

At a Court of Claims held in the City of Washington on the 9th day of January 1911, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendant, and *it* to order, adjudge and decree, that the petitions of Mary R. Peabody, Saco and Biddeford Savings Institution, Samuel Ellery Jennison and Portsmouth Harbor Land and Hotel Company, be and the same are hereby dismissed.

BY THE COURT.

48 X. *Claimants' Motions for New Trial and Orders of Court on Same.*

On February 6, 1911 the claimants filed a motion for a new trial which was overruled by the Court on February 20, 1911.

On March 9, 1911 the claimants filed a motion for a new trial which was overruled April 3, 1911.

On December 29, 1911 the claimants filed a motion to vacate judgments, motion to vacate orders overruling motions for a new trial and to restore causes to the calendar. On February 19, 1912 this motion was argued by Mr. John Lowell in support of the motion and Mr. Frederic De C. Faust opposed, and the motion was submitted. On February 26, 1912 the Court filed the following order:

Court of Claims of the United States.

Nos. 27500, 27501, 27502, 27503.

MARY R. PEABODY et al.
vs.
THE UNITED STATES.

Order.

In the above causes the claimants, by their attorneys having mo
a motion to vacate the orders overruling the motions for a ne
trial made by claimants in said causes, and it appearing that the s
motions for a new trial were brought before the court in chambe
without the knowledge and desire of claimants' counsel, and wi
out the knowledge of defendant's counsel, and before briefs we
filed by either party *and* not upon the motion of the court itself
of the attorney for the United States; and it appearing in con
quence that said motions for a new trial were prematurely consi
ered and overruled without briefs or argument.

It is ordered, that the orders overruling said motions for a ne
trial in said causes be and the same are hereby set aside and sa
motions are hereby referred to the Law Calendar.

BY THE COURT

49 XI. *Argument on Claimants' Motion for New Trial.*

On the 6th day of May 1912 the claimants' motion for new tr
came on to be heard. Mr. Chauncey Hackett and Mr. John Lowe
were heard in support of the motion and Mr. F. De C. Faust w
heard in opposition thereto and the motion was submitted.

XII. *Order of Court on said Motions. Filed May 27, 1912.*

Order.

Claimants' motion for a new trial is overruled. Claimants' mo
tion to amend the findings is allowed in part and overruled in par
Finding XII is amended by adding thereto the words: "The mos
suitable field for firing the guns of the battery in times of peace fo
practice or other purposes would be over the claimants' land."

As thus amended said findings to be filed nunc pro tunc as o
January 9, 1911, the judgment and opinion to stand.

The claimants' motion filed May 15, 1912, to amend findings i
overruled.

BY THE COURT

50 XIII. *Claimants' Application for and Allowance of Appeal.*

The Court of Claims.

No. 27500, also No. 27501, 27502, 27503.

MARY R. PEABODY
v.
THE UNITED STATES.

The claimants by their attorney, William Frye White, move this Honorable Court to grant appeals in the above cases to the Supreme Court of the United States.

WM. FRYE WHITE,
Attorney for Claimants.

Filed June 3, 1912.

Ordered: That the above appeals be allowed as prayed for.

June 3, 1912. BY THE COURT.

51 Court of Claims.

Mary R. Peabody, No. 27,500.
Saco and Biddeford Savings Institution, No. 27,501.
Samuel Ellery Jennison, No. 27,502.
The Portsmouth Harbor Land and Hotel Company, No. 27,503.

I, Archibald Hopkins, Chief Clerk Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled causes; of the findings of fact and conclusion of law filed by the Court; of the opinion of the Court; of the final judgment of the Court; of the claimants' motions for new trial and orders of the Court on same; of the argument on claimants' motion for new trial; of the order of the Court on said motions; of the claimants' application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 29th day of June 1912.

[Seal Court of Claims.]

ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 23,270. Court of Claims. Term No. 535. Mary R. Peabody, Saco and Biddeford Savings Institution, Samuel Ellery Jennison, and The Portsmouth Harbor Land and Hotel Company, appellants, vs. The United States. Filed June 29th, 1912. File No. 23,270.

Supreme Court of the United States

October Term, 1912.

Mary R. Peabody, Saco & Biddeford Savings Institution, Samuel Ellery Junkins, and the Portsmouth Harbor Land and Hotel Company, *Appellants*,
v.
The United States.

No. 289

Appeal from the Circuit Court of Errors.

MOTION TO ADVANCE

Now come the appellants and move the Court to advance this cause and set it down for hearing at the earliest date that will suit the convenience of the Court.

Mary R. Peabody,
Saco & Biddeford Savings Institution,
Samuel Ellery Junkins,
The Portsmouth Harbor Land & Hotel Co.

By Charles F. Hackett,
Counsel.

John E. Lovell,
Of Counsel.

Service of the above notice accepted this 17 December, 1912.

Wm. Marshall Bullitt,
Solicitor-General.

BRIEF.

We respectfully ask the Court to set this case down for hearing at the earliest day convenient to the Court. The action is brought to recover for the taking of certain property on Gerrish Island, formerly the land of the appellant Jemison, the value of which has been found by the Court of Claims to have been two hundred thousand dollars ($200,000) at the time of the alleged taking.

The appellant is pressing his right under the V amendment to the federal constitution, asserting that he is entitled to just compensation for property which has been taken for the public use.

His right to recover compensation is founded on the proposition that the Government has taken property by establishing on adjoining land a permanent battery of three ten inch guns including in their radius of fire property and firing them across the same (the private land intervening between the fort and the sea). Without regard for the pecuniary interest the decision in this case will determine an important question of policy of the United States in the future location of its coast defenses. The battery in question is located back of private property, that is, with private land existing between the fort and the sea. If the inclusion of private land within the radius of fire of a Government gun and the firing of projectiles over such private land be a taking, the United States will, in future, have to locate its coast defense forts directly on the sea or condemn the intervening land. If on the other hand this is not a taking, it will be highly advantageous to the Government to locate coast defense batteries behind private land instead of on the ocean front. The location of coast batteries depends on the outcome of this cause. It is to the interest of the United States to have this important question decided as soon as possible.

The appellant demands seventy thousand dollars ($70,000) in debt, because of the action of the Government of the United States with regard to this property. The interest on this debt continues to run against him while no interest can accrue to him if judgment be given in his favor, by reason of the rule of law that interest is not obtainable against the United States. The appellant is therefore exposed to a continuous loss and he is already in a condition of hopeless insolvency, unless the Court find in his favor.

If the case takes its usual course, it will not be heard for a year and a half, and the appellant will suffer a complete loss of the interest for this period, a loss for which he can never be reimbursed. Although insolvent he has not been forced into bankruptcy by reason of the confidence which his creditors have in him, and because of their forbearance. At any moment, however, he may be forced into bankruptcy and therefore the speedy hearing of this case means everything to him. We feel strongly that this is a case which merits prompt adjudication, being one of unusual hardship, and we trust that the Court will see its way clear to granting our prayer.

A similar motion was granted in a case of like hardship in *Jordan v. Tammany*, 205 U. S. 563, Oct. Term 1905, No. 170.

CHAUNCEY HACKETT,
For Appellant.

JOHN LOWELL,
Of Counsel.

AFFIDAVIT

fear of the repetition of such an occurrence destroyed the enterprise. From 1902 to 1904 I appealed to the War Department for relief, without avail, and continued to try to carry on the business, but from 1902 through 1904, instead of a profit of about ten thousand dollars ($10,000) a year I suffered a loss of about four thousand dollars ($4,000) each season, so after 1904, unable to stand further loss, I shut down the place, and brought suit against the United States, as there was nothing else I could do. At that time there were mortgages on the property of thirty-nine thousand dollars ($39,000) ($12,000 at 5% interest and $27,000 at 6% interest), and I was compelled to borrow nine thousand seven hundred dollars ($9,700) more at 6%, all of which remains unpaid, and I have been unable to pay any interest, keep up the insurance, or make any repairs up to the present time and now it is the only property I have. The principal and interest of my debts now amounts to over seventy thousand dollars ($70,000) so that I am and have been hopelessly insolvent, with the above liabilities and no assets (except some second hand furniture) except the amount, if now found due me by the United States for the property.

Why the mortgages have not been foreclosed and my creditors have not pressed for collection and plunged me into bankruptcy I do not understand, unless that, after many years' business relations with me, they have known me to be an upright and successful man, a developer and benefit to the community, who would pay whenever I had the money; and too, being perfectly familiar with the situation, have complete faith in the justice of my claim. But their forbearance cannot and ought not last forever. My lease of the Boston house, all that has kept me in existence, by my discharging the manager and filling the position myself, expires the first of next July, and, as the possibility of loss is great and the possibility of profit small, I do not dare to

try to continue it, if I were permitted. What will happen then, I know not, as over fifty-seven is a poor age at which to begin anew, and is not sought for employment; and my wife, having no fortune, I cannot live upon her. Almost literally have I been shot out of business standing and existence, unless my cause prevails, and every day of delay increases my indebtedness and reduces substantially the amount available if I succeed.

I am entirely destitute of means except for the lease of the Boston property which expires on the first of July next, and I have prosecuted this case through the kindness of my counsel who have not received so far any payment in the way of fees. July 1st I shall be absolutely without income and the question of the determination of my rights in this cause is of the most vital importance to me.

SAMUEL ELLERY JENNISON

Sworn to before me this 20th day of November, 1912.

HERBERT HENRY DARLING,
[SEAL] *Notary Public*,
Suffolk County.

Supreme Court of the United States.

October Term, [illegible]

Mary S. [illegible], [illegible] [illegible] [illegible], [illegible], [illegible] Dennison, and the Portsmouth Harbor Land and Hotel Company,

Appellants,

vs.

The United States.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

JOHN LOWELL,
WILLIAM HYDE WHITE,
CHAUNCEY HACKETT,

Attorneys.

Supreme Court of the United States.

October Term, 1912.

No. 695.

MARY R. PEABODY, SACO & BIDDEFORD SAVINGS INSTITUTION, SAMUEL ELLERY JENNISON, AND THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY,
Appellants

vs.

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APPEAL FROM THE COURT OF CLAIMS.

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Supreme Court of the United States.

October Term, 1912.

No. 695.

MARY R. PEABODY, SACO & BIDDEFORD SAVINGS INSTITUTION, SAMUEL ELLERY JENNISON, AND THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY,
Appellants

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT OF FACTS.

This appeal from the Court of Claims includes four cases all relating to the same subject. The parties have several interests in the same land for the taking of which by the United States the actions are brought. Mary R. Peabody and the Savings Institution are mortgagees; S. Ellery Jennison was the record owner until August 20th, 1902, and the Hotel Company took by deed from him on that date. In our consideration of the case, the title of the Hotel Com-

pany is unimportant as the land was taken by the United States, according to our view, before said Hotel Company acquired title (in June, 1902), and therefore Jennison (on the 20th of August, following), conveyed nothing to it. (Findings of Fact I, II, III, IV, XIII, Transcript of Record pages 24, 25, 28.)

The essential facts are as follows:

The property of the claimants consisted of about 200 acres of land extending for about a mile along the Atlantic Ocean at Gerrish Island in the State of Maine. This property was originally purchased by the claimant Jennison for the purpose of creating a seashore resort. With this end in view he had built thereon a first class summer hotel called the Pocahontas Hotel, from which he derived a net annual income of about $5,000. He had also built several cottages upon the property which were all rented and were returning reasonable rates of profit. The value of the property as found by the Court of Claims was $200,000. (V–IX, 25, 26.)

About a quarter of a mile behind the Hotel Pocahontas, and within 200 feet of the claimants' land the United States Government erected a coast defense battery of three ten inch guns known as Battery Bolden. According to the finding of the Court of Claims the guns of this battery were so placed that the most suitable field of fire in time of peace was over the claimants' land. (XI, XII, 27, 28.)

It was physically possible to fire the guns to sea over a narrow strip of land found by the Court of Claims to belong to the United States government, without the shots actually passing over the claimants' land, but to do so would necessitate firing close to an inhabited government lighthouse and just avoiding the Rye Beach section of the New Hampshire shore. (XII, 28.)

The guns of the battery were fired on three occasions prior to the beginning of this litigation, and each of these times the shot passed directly over the claimants' land.

MAPS

TOO

LARGE

FOR

FILMING

Scale of Miles
Map drawn by J. M. Dow
LITTLE BOAR'S HEAD
FOX HEAD

The situation is shown by the map. The narrow edge colored blue represents the extreme government contention as to the extent of free fire to open sea without going over the claimants' land. The wide pink area represents the zone of fire over the claimants' land. It is through this space that the shots were fired in 1902. The brown area represents the angle of fire which does not reach the open sea at all. (XII, XIII, 28.)

The Court of Claims has found that the claimants' property is of little value excepting as a summer resort (Finding VIII), and that the installation of the guns by the United States government has materially impaired the value of the property for that purpose and will continue to do so so long as they remain. (Finding XV.)

SPECIFICATIONS OF ERROR.

1. In concluding on the findings of fact that claimants are not entitled to recover, under the fifth amendment of the constitution.

2. In finding XI, in stating that the fortification which defendant started to build in June, 1873, and abandoned in 1876, before putting in any guns was "resumed" in 1898, 22 years later, when Battery Bohlen was begun on the site of the "former uncompleted battery"; in so far as the works begun in 1873 are concerned, there is error in the statement of the finding in that it is self-contradictory, stating in one place that work was *resumed* on the old abandoned battery and in another that work was begun on the new battery, whereas from the facts stated it is evident that the "old battery" so-called never came into existence as a battery, no guns ever having been set up, and that the present battery was an entirely new project begun in 1898 and completed in 1902.

3. In establishing the boundary in the manner shown (p. 461), on the map accompanying the opinion.

4. In holding that the possibility of firing the guns to sea

within the angle formed by the boundary adopted by the Court of Claims and the line intersecting the coast of New Hampshire (see map, p. 7) is decisive of the case.

5. In holding that the intention of the Government to use the land of claimant as negatived by the possibility of their being able to fire elsewhere.

6. In dismissing the petitions on the facts found.

7. In overruling the claimant's motion for a new trial.

8. In not amending the finding of law, and modifying the opinion, in accordance with the fact found by the Court, May 27, 1912, *i. e.*, that "the most suitable field for firing the guns of the battery in time of peace for practice or other purposes would be over the claimant's land."

9. In not finding that the property of the claimant has been taken from him without just compensation where guns of a permanent battery established by the United States have been fired over and across the same; and where the guns are so fixed as to make it possible to do so in the future.

10. In not holding that where a coast defense battery of 3 10-inch guns is established by the United States behind intervening sea-side property so that the most suitable field of fire is over said property and all of said guns have been fired over said property that the said property or a property right in the same has been taken within the meaning of the fifth amendment of the Federal Constitution, and that the United States is liable for the value thereof.

11. In not holding that where the United States has so fired guns over private land as to deprive the owner of the use thereof and to impair materially its value, and has so fixed the guns that they command the said land and deprive the owner of its use, that the land is taken within the meaning of the fifth amendment of the Federal Constitution.

ARGUMENT.

I.

IT IS IMPOSSIBLE TO FIRE THE GUNS WITH SAFETY EXCEPT OVER THE CLAIMANTS' LAND.

The Court of Claims has found that the guns of the battery may be fired for all necessary purposes in time of peace without the projectiles crossing over the claimants' land. A glance at the map will show that although it is thus possible for the guns to be fired over the area found by the Court of Claims to belong to the United States government, and without the shot actually passing over the claimants' land, to do so would necessitate firing close to Whalesback Light, an inhabited government lighthouse, and to the populous New Hampshire shore. When we consider that the range of these great ten-inch guns is from six to eight miles and that on striking the water the shot frequently deflects many degrees from the line of fire, it is evident that any shot fired over the area found to belong to the United States government would be dangerous both to life and property.

II.

THE UNITED STATES GOVERNMENT INTENDED TO FIRE THE GUNS OVER THE CLAIMANTS' LAND IN TIME OF PEACE.

The Court of Claims has found: first, that it was necessary to fire the guns for practice in time of peace (Finding XII); second, that the guns were so installed as to have a range of fire over all of the claimants' sea front (Finding

XII); third, that the most suitable field of fire was over the claimants' land (Finding XII); and fourth, that on the three occasions when the guns were actually fired, all prior to the beginning of this litigation, they were fired directly across the claimants' land (Finding XIII).

The above findings coupled with the fact already shown, that it would be extremely dangerous to fire these powerful guns in any direction except over the claimants' land, establish, as conclusively as anything can be established, that the intent of the government was to fire over the claimants' land. As the most suitable field of fire was across the claimants' land, it is inconceivable that the government would establish a battery intending always to use the guns in an unsuitable way.

III.

The fifth amendment to the United States Constitution provides in part as follows: "Nor shall private property be taken for public use without just compensation."

A. WHAT IS PROPERTY.

Until after the middle of the last century, property was considered to consist only in the actual possession of chattels or of land and the true meaning of property, namely the collection of rights attaching to the things or land, was not appreciated. These rights may be shortly defined as the rights of use, exclusion and disposition. It is these rights which constitute property and it is the interference with these rights which, if carried so far as to impair materially their value, constitutes a taking. We shall show by our

citations from text books and cases that the courts have now realized what is the true meaning of property.

In the case of

Old Colony and Fall River Railroad Company v. County of Plymouth, 11 Gray, 155,

at page 161, SHAW, C. J., says:

"The word 'property' in the tenth article of the Bill of Rights, which provides that 'whenever the public exigencies require that the property of any individual should be appropriated to public uses he shall receive a reasonable compensation therefor,' should have such a liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such.

"Nor is it material whether the property is removed from the possession of the owner, or in any respect changes hands; if it is of such a character and so situated that the exercise of the public use of it, as warranted by the legislature does in its necessary, natural consequences, affect the property, by taking it from the owner, or depriving him of the possession or some beneficial enjoyment of it, then it is 'appropriated' to public use by competent authority, and the owner is entitled to compensation."

Hare on *American Constitutional Law* says at page 357:

"The term property may be used to signify the thing owned or possessed, or the rights and privileges which together make up the aggregate of use or enjoyment implied in ownership. Property may therefore justly be defined as 'the dominion or indefinite right of user or disposition which one may exercise over particular things or subjects.' This is its appropriate meaning, and that which it has in the Constitution; although it is not infrequently used to indicate the thing rather than the right, and much of the uncertainty and con-

fusion observable in the decisions have arisen from overlooking this distinction.

"Such, manifestly, is the true interpretation of the Federal Constitution, because the same amendment which guarantees the right to compensation when property is taken for public purposes, provides that no person shall be deprived of life, liberty, or property without due process of law."

According to Bentham:

"The integral or entire right of property includes four particulars: 1. Right of occupation. 2. Right of excluding others. 3. Right of disposition or the right of transferring the integral right to other persons. 4. Right of transmission, in virtue of which the integral right is often transmitted after the death of the proprietor, without any disposition on his part to those in whose possession he would have wished to place it."

1 Bentham's Works (1843), 308.

Property is defined by the *New Oxford Dictionary* as

"the right (esp. the exclusive right) to the possession, use, or disposal of anything (usually of a tangible material thing)."

"Property signifies the right or interest which one has in land or chattels. In this sense it is used by the learned and unlearned, by men of all ranks and conditions. We find it so defined in dictionaries and so understood by the best authors."

Morrison v. Semple, 6 Binn., 94, 98,
approved in
Jackson v. Housel, 17 Johns., 281, 283.

"The exclusive right of possessing, enjoying and disposing of a thing, which, of course, includes the use of a thing."

Chicago & Western Indiana Railroad Co. vs. Englewood Connecting R. R. Co., 115 Ill., 375, 385.

"in its broader and more appropriate sense, is not alone the chattel or land itself but the right to freely possess, use, and alienate the same; and many things are considered property which have no tangible existence, but which are necessary to the satisfaction, use and enjoyment of that which is tangible."

City of Denver v. Beyer, 7 Colo., 113.

"Sometimes the term (property) is applied to the thing itself as to a horse or tract of land. These things, however, though the subjects of property, are, when coupled with possession, but the indicia, the visible manifestation of invisible rights the evidence of things not seen. 'Property then, in a determinate object, is composed of certain constituent elements to wit, the unrestricted right of use, enjoyment and disposal of that object.'"

City of St. Louis v. Hill, 116 Mo., 527.

"whatever a person can possess or enjoy by right."

Sinking Fund Cases, 99 U. S., 700, 738.

Lewis on *Eminent Domain* Third Edition, Volume 1, says on pages 51 and 52 "In determining the question of what constitutes the taking of property, it is important to have at the outset, a clear understanding of what property really is."

The term is applied in many different meanings. "Sometimes," says Austin, "it is taken in a loose and vulgar acceptation to denote not the right of property or dominion, but the subject of such a right; as where a horse or piece of land is called my property." 2 Austin's Jur., 1051. A little reflection, however, will suffice to convince anyone that property is not the corporeal thing itself of which it is predicated, but certain rights in or over the thing. Land undergoes no corporeal change by the mere fact of being reduced to the dominion and ownership of man. An animal *ferae naturae* may be precisely the same before and after capture, but in his former state no one would speak of him as property. We must, therefore, look beyond the thing

itself, beyond the mere corporeal object, for the true idea of property. Property may be defined as certain rights in things which pertain to persons and which are created and sanctioned by law. These rights are the right of user, the right of exclusion and the right of disposition.

The claimants were together the legal and equitable owners of the land, and as such had the right to occupy it, use it and enjoy it exclusively, subject to the restrictions established by law. They had the right to use the property in any way they saw fit, so long as they did not commit a nuisance, or otherwise imperil the safety, health and comfort of the community by using the property criminally or illegally. They could dig up the soil and carry it away; erect on it structures of any size or shape; devote the land to any use, agricultural, social, manufacturing, or otherwise as they saw fit; they could occupy any part of it at any time. It was wholly theirs, subject only to such regulations as the law imposes on all land plus certain rights in the public (such as navigation over submerged portions at high tide), common to all sea coast and riparian owners in the State of Maine.

B. WHAT CONSTITUTES A TAKING

In the early cases a taking was held to be the actual physical appropriation of the property or a divesting of the title of it.

Mr. Sedgwick writing on the subject in 1857, said:

> "It seems to be settled that, to entitle the owner to protection under this clause (Fifth Amendment to United States Constitution) the property must be actually taken, in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential damage no matter how serious or how clearly or unquestionably resulting from the exercise of the power of eminent domain."
>
> *Sedgwick* Const. Law, 2d Ed., pp. 456, 458.

The conception that a taking required actual appropriation of the property or a divesting of the title of it, has been gradually broadening.

Lewis on Eminent Domain, Vol. 1, pp. 56, 57, says:

> "If property, then, consists, not in tangible things themselves, but in certain rights in, appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence, his property may be taken, in the constitutional sense, though his title and possession remain undisturbed; and it may be laid down as a general proposition, based upon the nature of property itself, that whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, *pro tanto*, taken, and he is entitled to compensation."
>
> "It will thus be seen that, in order that there may be a recovery of compensation for damages to property no part of which is taken such damages must be the result of a violation of some one or more of the rights which constitute property."

In the case of

Stockdale v. Rio Grande Western Ry. Co., 28 Utah, 201,

the court says on page 211:

> "Any substantial interference with private property which destroys or lessens its value, or by which the owner's right to his use and enjoyment is in any substantial degree abridged or destroyed, is, in fact, and in law, a taking, in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remain undisturbed."

The question was decided in

Pumpelly v. Green Bay Co., 13 Wallace, 166,

which was an action of trespass on the case originally brought in the United States Circuit Court for the District of Wisconsin. The State Constitution provided that the property of no person should be taken for the public use without just compensation. It appears that the defendant company, for public purposes and acting under a statute, built a dam across the Fox River near the outlet of Lake Winnebago. The result was to raise the waters of the lake and to overflow the land of the plaintiff. The claim was advanced by the defendant company that the damages were such as the state had a right to inflict in improving the navigation of the Fox River, without making any compensation. The court held that the overflow of the land was a taking within the meaning of the Wisconsin constitution. The overflow worked an "almost complete destruction of the value of the land." (Opinion, p. 177.) There were "numerous authorities", said the court (p. 179)

> "to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on water-courses (Angell on Water-Courses, Sec. 465 a), equivalent to the taking of it, and that under the constitutional provision it is not necessary that the land should be absolutely taken."

On page 177 of the above decision Mr. Justice Miller in delivering the opinion of the court, said:

> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of juries, statesmen, and commentators as placing the just principles of common law on that subject beyond the ordinary power of legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value en-

> tirely, can inflict irreparable and permanent injury to any extent, can in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which has no warrant in the laws or practice of our ancestors."

Hare, in his work on *American Constitutional Law*, Vol. 1, says at page 388:

> "The main course of decision accordingly, is that if the beneficial use and enjoyment of property are prevented by actions done under an authority conferred by law, the property is as effectually taken as though the title were condemned."

The case of

United States v. Lynah, 188 U. S., 445,

was an action against the United States for compensation for the taking of certain real estate in South Carolina. It appeared that in improving the navigation of the Savannah River the government had built dams which raised the water in the river, backed it up against the embankments, and prevented the drainage of the plaintiff's plantation. By the majority of the court it was held a taking. Brewer, J., who delivered the opinion, saying *inter alia:*

> "While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested."

In the case of

Chappell v. United States, 34 Fed. Rep., 673,

the United States Lighthouse Board by authority of Congress, erected two lighthouses; one in front of the shore of the plaintiff's land, and the other about one mile back, upon land of someone other than the plaintiff. These were range lights to enable vessels to direct their course so as to keep in the Brewerton channel as excavated by the United States. It was requisite that there should be no intervening object between the lighthouses. The land of the plaintiff in respect to which he claimed compensation was between the two lights and was used by him, according to the petition, as a site for buildings for manufacturing purposes. He claimed that the United States has required of him that so much of his land as was within the range between the two lighthouses, and for a space not less than 60 feet in width, should remain unobstructed by buildings, and that he had been prevented by the United States from erecting buildings upon, and from using, that portion of his land and that the United States used it in the manner aforesaid.

The United States contended that the mere passage of light across the plaintiff's land cannot be held to be a use of it; and that, if the plaintiff yielded to the direction of the officers of the Lighthouse Board not to obstruct the line of range, he involuntarily consented to do what the officer could not have required him to do, and had no remedy at law.

On page 674, *Id.*, the Court said in passing upon the demurrer:

> "If the erection of the lighthouses, and the establishment of the range beacons, and the restriction placed upon the plaintiff not to erect structures on his own land which would obstruct the range was not done by lawful authority of the United States, then, of course, those who interfered with the plaintiff were wrongdoers and their acts tortious. But this is not the issue raised by the demurrer, or contended in argument. It is not suggested that the beacons were not located and maintained by authority of Congress. It

is not denied, in the petition as amended, that the land is the private property of the plaintiff. It is not denied that the obstruction which would have resulted from the plaintiff building upon his land between the beacons would have defeated the lawful purpose of the United States, and would have endangered the safety of vessels using the channel, which Congress had directed should be deepened, and should be marked by range beacons. These being the facts, it would seem clear that in requiring that the beacons should remain unobstructed, and in requiring that the plaintiff should desist from building on his intervening land, the officers of the Lighthouse Board were doing a lawful and authorized act, and one necessarily involved in the direction of Congress that the Board should erect and maintain the range beacons. It cannot be said, therefore, that their act was tortious. And we think it follows that, if the plaintiff, by submitting to their lawful commands, consented to a restriction upon the free use of his property which entailed damage or loss upon him, there is no obstacle to the juri-diction of the Court to his recovery."

The gist of the action lies in the fact that the lawful use of the plaintiff's land was incompatible with the purposes of the United States in erecting the beacon lights, and that, therefore, there was a denial to the plaintiff of the right to exercise such lawful rights in building structures upon his land.

After the decision of the court, seemingly yielding to the decision of the circuit court and to avoid the effect thereof, the Lighthouse Board commenced process for the condemnation of the 60-foot strip, and the owner of the land recovered damages before the condemnation jury for such a taking in the sum of $3,500. The case went to the Supreme Court, and is found in 160 U. S., 499.

Chappell v. United States, 160 U. S., 499.

The Chappell case has a very striking resemblance to the case at bar. The range lights are never in use except when a ship is proceeding up the channel. In the present case

the battery may not be said to be in use except when the guns are actually being fired. However, in each case the principal result of the establishment of the respective stations of government utility is to limit the use of the land, to make it useless for the purpose for which it is adapted, and materially to impair its value. Surely, to say that the range lights are only employed when a ship is proceeding up channel is the result of a narrow and technical use of language, which results from a false conception of the substantial facts. In a real sense, both the fort and the light houses may be said to be in use all the time. They must both be ready for instant employment when the occasion arises, and in each case the assertion of the government's dominion over the intervening space is a reality and not a legal fiction or a matter of presumption.

The second case involving the same land and the same title was brought up to the Supreme Court of the United States, in the October Term, 1895. This Court expressly affirms the principle of the case.

Chappell v. United States, 160 U. S., 499.

The case before them was a proceeding filed in the United States Court for the District of Maryland for the condemnation of a perpetual easement in a strip of fast land on Hawkins Point, in Arundel county, in the State of Maryland, for the purpose of transmitting rays of light without obstruction, both by day and by night, between two beacon lights, known as Hawkins Point Light and Leading Point Light, theretofore constructed and put into operation by the United States as range lights of the Brewerton channel of the Patapsco river in the State of Maryland. (This was a proceeding separate from the action brought by Chappell reported in 34 Federal.) Chappell demurred to the petition on the ground that it was without authority of law, and was not brought in accordance with the Act of August 1, 1888, c. 728, authorizing the condemnation of land for sites

of public buildings and for other purposes. The District Court overruled the demurrer, and being of the opinion that the condemnation of this easement ought to be had by the United States, and that the question of damages should be submitted to a jury, ordered a trial. The jury brought in a verdict assessing to Chappell damages in the sum of $3,500 for the enjoyment by the United States, in perpetuity, of the easement aforesaid. 160 U. S., 502. Subsequently, Chappell filed a plea to the jurisdiction of the Court, and, later, exceptions alleging that there was a want of power to condemn the property. 160 U. S., 503. The exceptions were overruled, and subsequently Chappell brought the case to the Supreme Court of the United States on a writ of error.

Mr. Justice Gray delivered the opinion of the Court. He held that no question of jurisdiction having been separately certified, and the writ of error having been allowed without restriction or qualification, the Supreme Court had jurisdiction, nevertheless, this being a case in which the constitutionality of a law of the United States was drawn in question. Having acquired jurisdiction under that heading, the Court would proceed to dispose not merely of the constitutional question but of the entire case, including all questions, whether of jurisdiction or merits. The Court held that the proceedings to condemn the land were constitutional, saying,

> "It is now well settled that whenever in the execution of the powers granted to the United States by the Constitution, lands in any State are needed by the United States for a fort, magazine, dock yard, light house, custom house, court house, post office, or any other public purpose, and can not be acquired by agreement with the owners, the Congress of the United States, exercising the right of eminent domain and making just compensation in the Court of the States with its courts, or by proceedings in the Courts of the United States, with or without the consent of the con-

current act of the State as Congress may direct or permit, etc., * * * nor is it necessary that Congress itself shall select the particular land to be taken."

"This proceeding," said the Court, "for the condemnation of *an interest in land for the use and benefit of the United States* for light-house purposes, was instituted in the District Court of the United States by the Secretary of the Treasury, action through the Attorney General of the United States, as authorized by the Act of Congress. Having been commenced in the name of the Secretary of the Treasury, it was rightly ordered to be amended so as to make the United States the framer as they were really the petitioners. *Kohl v. United States*, 91 U. S., 367; *United States vs. Jahn*, 155 U. S., 109-111; *United States vs. Hopwell*, 5 U. S. App., 137."

As if this were not enough to indicate that the Supreme Court recognized and expressly approved the doctrine that under the circumstances the land had been taken although there was no physical invasion of it in the material sense, it took the precaution of saying in the last paragraph of the opinion

"To prevent any possible misconception it is fit to observe that this case concerns only *the taking by the United States* or making compensation to the owner of an *interest* in fast land above high-water mark."

The case of

Eaton v. B. C. & M. R. R. Co., 51 N. H., 504,

was one where a railroad company in constructing its road cut through a ridge some distance north of the plaintiff's land, thereby making it possible for the waters of an adjacent river to flood the plaintiff's land in the time of freshets. Smith, J., in an elaborate opinion held this to be a taking of the plaintiff's property since it deprived him of his right to use and enjoy the same as he saw fit. On page 511 Judge Smith said:

"'The vital issue then is whether the injuries complained of amount to a taking of the plaintiff's property within the constitutional meaning of these terms. It might seem that to state such a question is to answer it, but an examination of the authority reveals a decided conflict of opinion. The constitutional prohibition has received in some quarters, a construction which renders it of comparatively little worth, being interpreted much as if it read, 'No person shall be divested of the formal title to property without compensation, but he may without compensation be deprived of all that makes the title valuable.' To constitute a taking of property it seems to have some times been held necessary that there should have been an exclusive appropriation, a total assumption of possession, a complete ouster, etc. These views seem to us to be founded on a misconception of the meaning of the term property. In a strict legal sense land is not property but the subject of property. The term property, although in common parlance is applied to a tract of land or a chattel, in its legal signification means only the rights of the owner in relation to it. * * * Property is the right of any person to use, possess and dispose of a thing. * * * If property and land consists in certain essential rights and a physical interference with the land substantially subverts one of those rights, such interference takes *pro tanto* the owner's property. * * * If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right, takes property; although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature, he has not the same property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to a qualified ownership. Restricting A's unlimited right of using 100 acres of land to a limited right of using the same land, may work a far greater injury to A than to take from him the title and fee simple to one acre, leaving him the unrestricted right of using the remaining 99 acres. No body doubts that the latter transaction would consti-

tute a 'taking of property.' Why not the former?" * * *

"The principle must be the same whether the owner is wholly deprived of the use of his land, or only partially deprived of it; although the amount of the value of the property taken in the two instances may widely differ. If a railroad corporation take a strip four rods wide out of a farm to build their track upon, they cannot escape paying for the strip by the plea that they have not taken the whole farm. So a partial, but substantial, restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. Taking a part is as much forbidden by the Constitution as taking the whole. The difference is only one of degree; the *quantum* of interest may vary, but the principle is the same."

The Eaton case has been cited with approval in

Grand Rapids Booming Co. v. Jarvis, 30 Mich., 308, 321;

Thompson v. Androscoggin Improvement Co., 54 N. H., 545,

and in numerous other decisions, including

Peabody v. United States, 13 C. C., 16.

It was held in

United States v. Welch, 217 U. S., 333,

that a right of way over another's land is property, and that when the United States acquires the fee of the land over which the right of way goes, that is a taking of the right of way.

"A private right of way is an easement and is land. We perceive no reason why it should not be held to be acquired by the United States as incident to the fee for which it admits it must pay. But if it were only destroyed and ended, a destruction for a public purpose may as well be a taking as would an appropriation for the same end. *Miller v. Horton*, 152 Mass.,

540, 547. The same reasoning that allows a recovery for the taking of land by permanent occupation allows it for a right of way taken in the same manner, and the value of the easement cannot be ascertained without reference to the dominant estate to which it was attached. The argument is only confused by reference to cases like *Gibson v. United States*, 166 U. S., 269."

The Welch case was followed in

United States v. Grizzard, 219 U. S., 180,

which held that the just compensation to be awarded in a case where a part only of claimant's land was flooded, besides the market value of the land flooded, should include damage to the remaining land resulting from such taking. To do otherwise, said the Court, "would be a travesty upon justice."

Sharp v. United States, 191 U. S., 341,

is not in conflict. That case went off on the ground that the depreciation in value occurred to a neighboring but distinct tract belonging to the same owner.

Compare

United States v. Alexander, 148 U. S., 186;

Sprague v. Dorr, 185, Mass., 10, (taking when the State, in the interests of public health, compels an owner to abandon his proscriptive right to pollute a stream).

See also 15 Cyc. 660, note 11; and *Ib.*, pages 661-670 inclusive, and notes.

Without going to the length of the Eaton case we submit that the reasoning and the principle of the Chappell case are logical and sound and were properly upheld by this Court, viz: that where lighthouses have been located so that the zone of light between them extends across the

claimant's land so as to make it impossible for him to erect buildings thereon or to use the land for the purposes for which it is best adapted, it deprives the claimant of his property so as to entitle him to compensation. Where the construction of the Fort with the batteries installed in preparation for war in time of peace, where the most suitable and only safe field of fire was across the claimant's land, this too prevents his erecting buildings and using his land for the purposes for which it is best adapted and for which he had acquired it, and so deprives him of his property so as to constitute a taking and entitle him to compensation.

IV

CLAIMANT'S PROPERTY HAS BEEN TAKEN.

The Court of Claims has found that the erection of Fort Foster and the installation of the guns thereon has materially impaired the value of the claimant's land, because probable guests of the hotel and lessees or purchasers of the cottages or land will apprehend that the Artillery may fire in time of peace over and across the land, etc. (Finding 14-V). In order to appreciate the grounds for such apprehension it is necessary to consider what occurs on the firing of one of these ten inch guns. The guns of the battery are set up so that in normal firing position their muzzles are 350 feet from claimant's boundary line which runs directly in front of them. The three guns are mounted in line, thus:

O O O

and to them claimant's boundary line runs almost parallel. Upon the firing of one of the guns the effect in front and about the mouth of the gun and along the path of the shot, is inexpressibly violent. Turf is ripped up; calm water suddenly and intensely agitated and everything within the

sphere of disturbance is shattered as if by a convulsion of nature. It is not known how near a human being could stand to the path of the projectile. Certainly no sane man would willingly stand within three or four hundred feet of its path. From this one can readily imagine what the effect would be of firing the guns of the battery across the claimant's land.

Can it possibly be said that with this menace constantly threatening the claimants' land materially and permanently impairing its value, their rights of use, exclusion and disposition, have not been so seriously interfered with as to constitute a taking?

The claimants' land extends in contemplation of law *usque ad coelum*.

Co. Litt. 4b;
2 Bla. Com. 18;
4 Kent. Com. 401;
Wells v. Pollock on Torts, p. 423;
Cowan v. Hall, 11 Com. 546;
Hammersmith Board of Works v. Tel. Co., 18 Q. B. Div. 912;
Humphries v. Brogden, 12 Q. B., 739;
Hargrave v. Roberts, 6 El. & Bl., 643; 7 El. & Bl., 627;
Erskine's Inst. Laws Scotland, Book II, title 9, sec. 11;
1 American Law Reg. (N. S.), 577;
Lyon v. Webb, 1 App. Cases (1895), 12;
Corbett v. Hill, L. R., 9 Eq., 671.

After the erection of the battery how much of the claimants' right of user was left? The space above their land was subjected to use by the Government for the firing of projectiles across it, thereby making it impossible any longer to operate the hotel or to use the land as a seashore resort. Nor indeed could the land be used for any other profitable purpose. Clearly the Government has acquired the claimants' right of user of the space above their land and has

deprived them of its use, thereby destroying the value of the property.

By the installation of the battery the Government has also deprived the claimants of their right of exclusion; for clearly they could not exclude the United States from firing the guns over their property.

These rights of use and exclusion thus acquired by the United States Government so encumber the claimants' property as to make it impossible for them to dispose of it as a summer resort. As found by the Court of Claims it was of little value for any other purpose.

The installation of a battery, the proper and contemplated use of which causes such an interference with the rights of use, exclusion and disposition as to destroy the value of the land for the purpose which it was used, constitutes a taking.

As we have said, the property of the claimants consisted of the rights of user, exclusion and disposition. So far as they are concerned, these rights have been greatly impaired, in fact have become valueless. The Court of Claims has found that this impairment of the value of the property will continue so long as the Fort and artillery therein are maintained (Finding 15). We find the United States in the enjoyment of the greater part of these rights. It is clear therefore, that the United States has taken the claimants' property within the meaning of the Fifth Amendment.

V.

THE DECISION OF THE COURT OF CLAIMS IS WRONG.

The Court of Claims based its decision upon the application of the law of Maine, as to boundary lines of contiguous proprietors, as laid down in the case of *Emerson v. Taylor*, 9 Maine, 42, to the case at bar. The Court of Claims states the rules of Emerson v. Taylor to be as fol-

lows: to divide flats between adjoining riparian proprietors, draw a base line from one corner, at high-water mark, of each lot to the other, and run a line from each end of this line at right angles to low-water mark. If by reason of the curvature of the shore, the lines diverge or conflict with each other, the gain or loss is to be divided equally between adjoining lot owners by bisecting the angles made by the diverging or conflicting lines.

By applying this rule, the Court of Claims found that the claimants did not own the entire area over which the guns of the battery could be fired, as was claimed by them, but that a narrow section of this area belonged to the United States Government. The Court found that this narrow section of flats was sufficient territory over which to fire the guns of the battery for practice and all other necessary purposes in time of peace. From this finding they arrived at the conclusion that the United States Government only intended to fire the guns over this narrow section, and that therefore there was no taking of the claimants' property simply because on one or two occasions the guns were fired across their land.

The decision can only stand if we assume that the United States Government realized at the time it installed the battery that it owned this area over which the Court found that it could fire in time of peace without shooting over the claimants' land, and that it did not intend to fire over any other land. Such a contention cannot be sustained, for it is inconceivable that the Government could have had any such intention in mind at the time of installing the battery, and that they intended to fire the guns in time of peace only over a narrow and unsuitable field of fire and one where the result of firing would almost surely be attended with disastrous consequences.

VI

THE LINE OF CASES IN THIS COURT IN WHICH IT HAS BEEN HELD THAT THE ACTS COMPLAINED OF DID NOT CONSTITUTE A TAKING WITHIN THE MEANING OF THE FIFTH AMENDMENT ARE CLEARLY DISTINGUISHABLE FROM THE CASE AT BAR

This line of cases is best represented by the following:

Transportation Co. v. Chicago, 99 U. S., 635;
Gibson v. U. S., 166 U. S., 269;
Scranton v. Wheeler, 179 U. S., 141;
Bedford v. U. S., 192 U. S., 217

all of which were relied on by the Government in their brief in the Court of Claims.

Transportation Company v. City of Chicago, supra, in the first place was not a suit to recover "compensation" for a "taking." The plaintiff was the owner of land at the intersection of La Salle Street and the Chicago River. By authority of the Legislature the City undertook the construction of a tunnel under the river, continuing La Salle Street, and during the construction, La Salle Street was closed in front of the plaintiff's property, and a coffer dam in the river prevented access to a wharf of the plaintiff's on the river side of his lot. The loss of access was only temporary, while the work was in progress. The plaintiff contended that the conditions constituted a nuisance, such as gave a common law action. The Court held that the work having been done by Legislative authority could not be a nuisance. It was then pointed out that whether the ownership of the street was in the plaintiff or the defendant, in either event the ownership was subject to the paramount servitude or easement of the public, the conclusion being that any lawful exercise of this right could effect no damage for which recovery could be had, for the reason

that the damage was merely incidental or consequential, there being no direct encroachment upon the private property. The same reasoning was applied to the contention as to the wharf, the private riparian ownership being likewise subject to the servitude of the State in the river.

Gibson v. U. S. supra, was a case of a riparian owner whose landing on the Ohio River was deprived of its usefulness by the results following the construction by the United States in the river of a dike for the purpose of improving navigation. The dike modified the course of the channel. This case was held against the claimant solely upon the ground that the riparian ownership was subject to the easement or servitude in respect to navigation which was in the United States by virtue of the Federal Constitution and that damages resulting from the exercise of this right were necessarily indirect and consequential.

The Court's attention is called to the latter part of the opinion where on page 270 the following language is used:

> "Riparian ownerships subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard. The Legislative authorities for those works existed simply in an appropriation for their construction; but this was the assertion of a right belonging to the Government, to which the riparian property was subject, and not of a right to appropriate private property not burdened with such a servitude to public purposes."

Scranton v. Wheeler, supra, was a case in which the United States for the purpose of improving navigation, constructed a pier in a river upon submerged land, title to which was, under the State law, in the plaintiff. The pier cut off the plaintiff's access to the channel. Here again the decision, which was against the plaintiff, was based upon the ground that the ownership of the plaintiff was subject to the right of servitude in favor of the United

VII.

THE CLAIMANTS' PROPERTY HAS BEEN TAKEN: THE UNITED STATES HAS TAKEN TITLE TO THE WHOLE OF THE CLAIMANTS' PROPERTY COMMANDED BY THE GUNS BY ACQUIRING THE VALUE THEREOF AND ASSUMING DOMINION THEREOF IN PERPETUO.

"Use is the real side of property."

"If, therefore, another acquire such an interest in my land as deprives me of the whole value, it makes little difference in whom the fee is vested." So remarked Mr. Justice Brewer in *United States v. Lynah*.

Lord Coke says:

> "So if a man grant to another to dig turves in his land and to carry them at his will and pleasure, the land shall not passe; because but part of the profit is given for trees, mines, etc., shall not passe; but if a man seized of lands in fee by his deed granteth to another the profit of those lands to have and to hold to him and his heirs, and maketh the livery *secundum formam doni*, the whole land itself doth passe; for what is the land but the profits thereof: for thereby vesture, herbage, trees, mines and all whatsoever parcel of that land doth passe."
>
> Co. Litt., 4b.

The findings show that the land was of little value except as a summer resort, and that it can no longer be used as a summer resort.

> "Shylock announces the essence of the doctrine under discussion when, after he has been deprived of his property by the judgment of the court, he says:
>
> 'You take my house, when you do take the prop
> That doth sustain my house; you take my life
> When you do take the means whereby I live.'"
>
> Court of Claims, per BARNEY, J., in *Peabody v. United States*, 43 C. C., 18.

SUMMARY.

The United States has established a battery behind the claimants' seaside property and has fired over it, and must continue to do so in order to use the battery (Statement of Facts; Argument I, II).

The word "Property" as used in the Fifth Amendment embraces all valuable rights in relation to land. The word "Taken" includes any permanent restriction on the use of land involving any material impairment of its value. Property is taken when the land is flooded; or a right of way over another's land is cut off; or a ray of light is passed over land by a permanent installation (III).

In the present case, the firing of the guns over claimant's land having restricted permanently its use, and having destroyed its value, the property has been taken (IV).

The decision of the Court of Claims is wrong (V).

This is not a case of loss of access, nor a case where the land was subject to a servitude in favor of the United States; nor a case where the damage was consequential (VI).

It is a case where upon the firing of the guns the United States took the valuable use of the land and thereby virtually, though not formally, has appropriated the title as well (VII).

We respectfully submit that the judgment of the Court of Claims should be reversed.

JOHN LOWELL,
WILLIAM FRYE WHITE,
CHAUNCEY HACKETT,
for
MARY R. PEABODY, SACO & BIDDEFORD SAVINGS INSTITUTION, SAMUEL ELLERY JENNISON and THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY, *Appellants*.

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No. ~~695~~. 289

In the Supreme Court of the United States.

OCTOBER TERM 1912.

MARY R. PEABODY, SACO AND BIDDEFORD SAVINGS INSTITUTION, SAMUEL ELLERY JENNISON, AND THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY, APPELLANTS,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1913

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

MARY E. PEABODY, SACO AND BIDDEFORD Savings Institution, Samuel Ellery Jennison, and the Portsmouth Harbor Land and Hotel Company, appellants,
v.
THE UNITED STATES.

No. 695.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment of the Court of Claims dismissing the claimants' amended petitions, which sought to recover the value of 200 acres of land, with improvements, used as a summer resort on Gerrish Island, in the State of Maine, and alleged to have been taken by the United States in the exercise of its power of eminent domain, without compensation and in violation of the fifth amendment to the Constitution.

The parties claimant are Mary R. Peabody and the Saco & Biddeford Savings Institution, mortgagees of the property; Samuel Ellery Jennison, the record owner until August 20, 1902; and the Portsmouth Harbor Land & Hotel Company, a corporation to whom on the date last named Jennison conveyed the whole property, subject to the above mortgages.

The facts out of which the claims arose, as found by the court below, may be summarized as follows:

By the act of February 21, 1873 (17 Stats., 468), Congress appropriated "for batteries in Portsmouth Harbor, Portsmouth, New Hampshire, on Gerrish Island and Jerry Point, fifty thousand dollars," and by the acts of April 3, 1874 (18 Stats., 25), and February 10, 1875 (19 Stats., 313), $30,000 and $20,000 additional, respectively, for the same purpose. Under the authority thus conferred the United States, in May, 1873, purchased a tract of approximately 70 acres of land on Gerrish Island, which forms the southwestern extremity of the State of Maine, at the entrance to Portsmouth Harbor, and in June of the following year began to construct thereon a 12-gun battery estimated to cost $45,200, under the supervision of the Chief of Engineers of the Army, which battery, with the one opposite, on Jerry Point, formed the outer line of defenses to Portsmouth Harbor and the navy yard at Kittery, Maine.

In 1876 the work had reached an advanced stage of construction, and $50,000 had been expended thereon. The breast-height walls of the fortification

had been finished and the gun platforms built except laying the irons. Operations were closed in September of that year, however, for lack of funds, and although plans were subsequently prepared and an appropriation of $36,000 requested for the completion of the work during each fiscal year from 1876 to 1886, in the annual reports of the Secretary of War, no appropriation was made nor was work resumed upon said fortification until 1898, when an allotment was made from funds provided at the outbreak of the War with Spain by act of May 7, 1898, entitled "An act making appropriations for fortification and other works of defense for the armament thereof and for the procurement of heavy ordnance for service and for other purposes" (30 Stats., 400), and the work of constructing a battery, consisting of three 10-inch guns mounted on disappearing carriages and two 3-inch rapid-fire guns, was begun in September of that year, on the site of the former uncompleted battery commenced in 1873, which was practically completed and transferred to the Artillery in December, 1901, and named "Battery Bohlen." The fortification in which it is contained is called "Fort Foster" and forms part of the defenses of Portsmouth Harbor. (Finding XI, Rec., pp. 27 and 28.)

In 1884, eleven years after the Government purchased its land and began the construction of its fortification thereon, Samuel Ellery Jennison, one of the claimants herein, became the owner of the tract of 200 acres involved in this suit immediately adjoining the

land of the Government on the south and east (Findings III and IV, Rec., p. 25), which tract was suitable for summer residences or a summer resort on account of its mile of frontage on the Atlantic Ocean and other natural advantages, but was otherwise of little value. (Findings VII and VIII, Rec., p. 26.) He thereafter erected on the westerly end thereof, within 200 feet of the boundary of the Government reservation, and 1,000 feet of the uncompleted fortification, a frame building called the Pocahontas Hotel, and farther to the eastward seven cottages as well as various other buildings accessory thereto (more particularly described in Finding VI, Rec., p. 25), all of which at the time the reconstruction of Fort Foster were already built and in operation.

No part of Fort Foster encroaches upon the abutting land of the claimants. (Finding XI, Rec., pp. 27, 28.) The boundaries of the respective tracts, the location of the fort and its guns, the hotel and other buildings are shown on the map incorporated in the opinion of the court, opposite page 30 of the Record.

After the transfer of Fort Foster to the Artillery, on the 22nd day of June, 1902, the Government caused two of its guns to be fired for the purpose of testing them at a target off the coast in such a direction that the missiles therefrom went over and across the lands of the claimants, and on the 25th of September following fired another of its guns for the same purpose and in the same manner, the effect of such fire being to do damage by concussion to the

buildings thereon situated, and the furniture therein, to the extent of $150. None of these guns have since been fired, nor have any troops been assigned to the fort. The guns, however, have been kept in good condition since their installation by a detail from Fort Constitution situated just across the Piscataqua River. (Finding XIII, Rec., p. 28.)

On the 20th of August, 1902, Jennison conveyed the entire tract in controversy to the Portsmouth Harbor Land & Hotel Company, a body corporate, organized under the laws of the State of Maine, in whom the title has since remained. (Finding IV, Rec., p. 25.)

The claimants conducted the hotel until the end of the season of 1904, since which date it has been closed.

Prior to the season of 1903 the hotel yielded the claimants a net profit of about $5,000 per annum, and the cottages, all of which were rented for the summer seasons, a reasonable rate of profit. During the seasons of 1903 and 1904 there was a loss to the claimants in conducting the hotel, and only a portion of the cottages during each summer season have since been rented at reduced rates as compared with previous years. (Finding IX, Rec., pp. 26 and 27.)

Subsequently, on March 2, 1905, the claimants began separate suits in the Court of Claims, which were afterwards consolidated by stipulation, to recover the alleged value of the whole tract of 200 acres and improvements, which it was claimed had

been taken by the United States without compensation and in violation of the fifth amendment. The allegation upon which the suits were based was that by the location of the fort and the installation of its guns so that the zone or field of fire of the same was necessarily over the claimants' land, the United States thereby took a right in the nature of a perpetual easement, which included not only the claimants' land, but the air over their land as well, and constituted a taking of private property for public use within the meaning of the fifth amendment.

The Government interposed general demurrers to the petitions as not stating facts sufficient to constitute causes of action. The court sustained the demurrers, with leave, however, to amend the petitions, declaring in an opinion by Fahey, J., that under the most liberal construction of the allegations there had been no taking of the property of the claimants or any of its uses within any of the authorities upon the subject, and in the concluding paragraph of the opinion said:

> If the averments of the petition had shown an intention and plan on the part of the Government, in time of peace, to fire the guns of the fort over and across the premises of the claimant for practice or any other purpose, and thereby interfere with her exclusive use of the same; or if it had been alleged that there was any intention and plan on the part of the Government, in time of peace, to continue to fire the guns of the fort in any direction so as to repeat and make permanent the damage by

> concussion to the claimants' property and thereby destroy its use, an entirely different question would be presented and one which is not here decided. (*Peabody* v. *U. S.*, 43 C. Cls., p. 19.)

In the amended petitions subsequently filed claimants attempted to bring their claims within this latter expression of the court and to allege a taking of their property by averring in substance that it was and is the intention and a necessary part of the plan of the Government to fire the guns of Fort Foster at any and all times over and across the premises of the claimants for practice and other purposes, and that none of said guns can be so fired for any effective purpose without the projectiles from the same passing over the claimants' intervening land. Hence that Fort Foster can not be used for the purpose for which it was erected without the use by the United States of said property and the easements appurtenant thereto.

Upon the evidence adduced by both parties at the trial upon the merits the court found the fact to be that under the law of Maine applicable to the boundary lines of adjoining riparian proprietors between high and low water, the guns of Fort Foster may be fired for practice and for all other necessary purposes in time of peace without the projectiles from the same passing over or across the claimants' land, and in the course of its opinion said:

> Such being the case, it can hardly be contended that the firing of these guns, each of

them once, in another direction so as to send the projectiles over the claimants' land constitutes a "taking" of their property. We can only judge of what property, if any, the Government has designed to have taken, by that over which it has asserted some dominion, or from the possession or enjoyment of which it has actually deprived the owner. If the single discharge of its guns over the lands of the claimants caused them any damage, as it doubtless did, it was a loss over which, as against the Government, this court and no court has any jurisdiction.

The presence of Fort Foster and the probability and perhaps certainty that at times the guns there installed will be fired in time of peace for practice, and that such firing by concussion will injure the property of the plaintiffs, as well as disturb the quietude of summer resorters in its locality, is but consequential damage for which the Government is not liable.

Hence the petition is dismissed.

Three separate motions for new trials were subsequently filed by the claimants and overruled by the court, and thereafter the claimants perfected this appeal.

ARGUMENT.

I.

The question arises upon the threshold of this argument as to whether the owner of record of the property at the time of the alleged taking is not estopped from asserting in this court that it has been taken by the United States in violation of the fifth amendment to the Constitution.

By the findings of fact of the court below it is established that the appellant, Samuel Ellery Jennison, in whom the title to the whole property was vested, conveyed on August 20, 1902, nearly three years before these suits were filed (subject to the mortgages of the appellants, Mary R. Peabody and The Saco & Biddeford Savings Institution, respectively), the entire tract of land to the Portsmouth Harbor Land and Hotel Company, a body corporate, incorporated under the laws of the State of Maine, in whom the legal title has ever since remained. (Finding IV, Rec., p. 25.)

It has been asserted, in the opening statement of the appellant's brief, page 7, that the title of the Hotel Company is unimportant, as the land was taken, according to their view of the law, in June, 1902, or two months before that company had acquired its title. This view of the law is manifestly unsound, all of Jennison's rights, of whatever nature, in and to the land in question, under the terms of the finding, passed to the Hotel Company.

The question now naturally arises, did not Jennison, by his conveyance of all of his right, title, and interest in and to the entire tract to the Hotel Com-

pany, necessarily abandon his claim for the taking of the land for public use without just compensation, as he placed himself in a position where he could not convey to the United States the fee and the possession in the event that judgment should be rendered in his favor.

This court in the case of *United States* v. *Lynah* (188 U. S., 445–490) held that:

> The proceedings must be regarded as an actual appropriation of the land, including the possession and the fee, and, when the amount awarded as compensation is paid, the title, the fee, and whatever rights may attach thereto pass to the Government, which becomes henceforth the owner.

This court also in the case of the *United States* v. *Sowell* (217 U. S., pp. 601, 602), in a *per curiam opinion*, said:

> It is ordered that before the Government is required to pay for the land held to have been taken plaintiffs below shall furnish a survey definitely ascertaining the land by metes and bounds.

The Court of Claims, in the case of *Hoyeard* v. *United States* (46 C. Cls., 484, 501), after rendering judgment, said:

> Before payment of the amount properly due according to the survey, plaintiff will execute a conveyance granting and conveying his title to the United States.

The owner of the land in this case, at the time of the alleged taking, appears to have been placed in

a position of electing to sue the Government for the taking, in which event he would be required to convey the title and possession, or to keep the property or sell to some one else, which last he did, and by so doing abandoned his right to sue the Government.

TITLE OF THE APPELLANT HOTEL CO.

Some time after the trial of the case and the rendition of judgment by the court below dismissing the petitions, the Hotel Company, through the same counsel representing it in this case, brought an action of trespass, *quare clausum*, in the Supreme Judicial Court of Maine against one Swift to recover damages for driving stakes and mooring a boat upon a part of the very flats appurtenant to Gerrish Island involved in this suit. The case came up before the Maine court upon an agreed statement of facts, which, while failing to show the source of the title of either party, was prosecuted to final judgment by the Hotel Company upon its direct assertion of ownership, not merely to a part of the flats, but to the whole of the identical tract which it is now contended upon this appeal was "taken" by the United States more than ten years before.

The Supreme Court of Maine, applying the rule first laid down in the case of *Emerson* v. *Taylor* (9 Maine, 42), which it declared had been the settled rule for the division of adjoining riparian lands between high and low water in Maine for eighty years, held that the boundaries of the land owned by the Hotel Company did not include the flats upon which the alleged trespass had been committed,

but that such flats lay within the boundaries of the land of the defendant Swift, who is not a party to the suit at bar, and rendered judgment accordingly. (*Portsmouth Harbor Land & Hotel Co.* v. *Swift*, 82 Atlantic Reporter, 542.)

The attention of the court is particularly invited to a plan incorporated in the opinion upon which is laid down the outlines of the plaintiff's and defendants' land with relation to the Government reservation.

Thus it will be seen that the Hotel Company in a direct proceeding asserted ownership to the identical tract which it now declares in this court it never owned, and that its title has been sustained and the boundaries thereof permanently and definitely fixed by the judgment of the highest court of Maine.

Under these circumstances we think it clearly results that the Hotel Company by its own acts and declarations is estopped from asserting upon this appeal that this same property was taken by the United States in 1902.

INTERESTS OF APPELLANT MORTGAGEES.

The two remaining appellants, Mary R. Peabody and the Saco and Biddeford Savings Institution, are mortgagees of the property, the former of twenty acres of the tract to secure a debt of $12,000.00 and the latter of the remainder of the tract to secure a debt of $22,000.00. Mrs. Peabody's mortgage is dated December 30, 1897 (Finding VI, record, p. 25), or twenty-four years after the United States pur-

chased the adjacent tract and began to erect its fortification thereon.

The Savings Institution's mortgage is dated January 22, 1900 (record, p. 9), or nearly two years after work was resumed upon the fortification with funds provided by the act of May 7, 1898, *supra*. Each of these mortgagees, therefore, acquired their interests in the property with full knowledge of the purpose for which the adjacent land of the Government was to be used, and being charged with such notice should not now be heard to say that the mere completion of the fortification has resulted in a taking by the United States of the mortgaged premises.

Appellants deny the accuracy of that part of Finding XI (record, pp. 27–28), which relates to the resumption of the work and the reconstruction of the fortification, upon the ground that the finding is self-contradictory in stating in one place that the fortification begun in 1873 and "*abandoned*" in 1876 was resumed in 1898; because they assert from the facts stated it is evident that the present battery was an entirely new project, begun in 1898 and completed in 1902. (Brief, p. 7.)

This objection is wholly without merit, as the terms of the finding itself disclose. The construction of the fortification was never abandoned, but, as the court expressly finds, after reaching an advanced stage, at a cost of $50,000.00, operations were closed in September, 1876, for lack of funds, and although plans were subsequently prepared for the completion of the work, and an appropriation requested, for ten successive fiscal years, "work was

not *resumed* upon said fortification until after the passage of the act of May 7, 1898," when the original project was carried to completion by the construction of Battery Bohlen on the site of the former uncompleted battery begun in 1873.

II.

The fundamental proposition upon which appellants rely in this court to establish the taking of their property rests upon a false premise and is opposed to the findings of fact.

The finding of fact based upon the rule of *Emerson* v. *Taylor*, *supra*, the application of which is not denied that "the guns of Fort Foster may be fired for practice and for all other purposes in time of peace without the projectiles from the same passing over or across the claimant's land" (Finding XII, Rec., p. 28), having eliminated the fundamental proposition upon which appellants relied to establish the use and taking of their property in the court below, appellants are compelled to shift the basis of their claim in this court.

Accordingly, they now contend, in substance, that while it was physically possible to thus fire the guns, yet to do so would be extremely dangerous to life and property, from which the argument is deduced that as such firing could not be accomplished with safety, or for any effective purpose without the projectiles passing over appellants' land, the installation of the battery necessarily contemplated the use of appellants' property, and constituted a taking thereof within the meaning of the fifth amendment.

This contention and appellants' entire argument predicated upon it is unsound for two reasons:

First. The court has not found "that it was necessary to fire the guns for practice in time of peace," as counsel declare at page 9 of the brief, but merely that the guns *may be* thus fired. Indeed Finding XIV (Rec., p. 28) expressly declares:

> It does not appear from the evidence that there is any intention on the part of the Government to fire any of its guns now installed, or which may hereafter be installed, at said fort in time of peace over and across the lands of the claimants so as to deprive them of the use of the same or any part thereof or to injure the same by concussion or otherwise, excepting as such intention can be drawn from the fact that the guns now installed in said fort are so fixed as to make it possible so to do and the further fact that they were so fired upon the occasions [more than 10 years before] as hereinbefore found.

Second. The language of Finding XII (Rec., p. 28) that the guns "may be fired *for practice and for all other necessary purposes* in time of peace" without shooting across the claimant's land, necessarily preclude appellants under repeated decisions of this court from attempting to go behind the findings of the trial court and reopen upon appeal an issue of fact decided adversely to them. (*United States* v. *Adams*, 6 Wal., 101, 112; *McClure* v. *United States*, 116 U. S., 145; *Sisseton Indians* v. *United States*, 208 U. S., 566; *District of Columbia* v. *Barnes*, 197 U. S., 146, 150.)

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MAP IN APPELLANT'S BRIEF INCOMPETENT.

For this reason and also because it has not been identified or its authenticity in any manner established, the map contained in appellants' brief opposite page 7, which inspection will show differs materially from that forming a part of the opinion of the court below, is wholly incompetent for any purpose and should be disregarded in the consideration of the case.

DECISION OF COURT BELOW SHOULD BE AFFIRMED.

For these reasons it is clear that the entire theory of the alleged taking and the argument advanced in its support rest upon unsound premises, and, as appellants do not dispute the application of the rule of *Emerson* v. *Taylor* to the actual facts in the case, the decision of the court below should be affirmed. Indeed, the appellants practically concede this result, although upon different ground, at page 29 of their brief, where they say, with reference to the judgment of the lower court:

> The decision can only stand if we assume that the United States Government realized at the time it installed the battery that it owned this area over which the court found that it could fire in time of peace without shooting over the claimant's land, and that it did not intend to fire over any other land.

In view of the settled rule of law which has prevailed for over 80 years in Maine for the division of the lands of adjoining riparian proprietors, similarly situated, of which knowledge upon the part of the

Government is necessarily presumed, and in view of the further presumption that the Government does not intend to use its property in an unlawful manner, or so as to needlessly injure the private property of its citizens, the assumption which appellants thus suggested must necessarily be taken as true, and upon appellants' own concession the decision below should stand.

Aside from these considerations, however, and under the most liberal interpretation of the findings, it is manifest that

III.

There has been no taking of appellants' property or any of its uses within the rule established by the decisions of this court.

The rule is well settled under repeated decisions of this court that to entitle an owner to the protection of the fifth amendment there must be some actual physical invasion of the land, and a visible appropriation of some of its uses, equivalent to a practical ouster from possession. (*Pumpelly* v. *Green Bay Company*, 13 Wall., 166; *United States* v. *Lynah*, 188 U. S., 445; *Sharp* v. *United States*, 191 U. S., 341; *Manigault* v. *Springs*, 199 U. S., 473; *United States* v. *Welch*, 217 U. S., 338; *United States* v. *Grizzard*, 219, U. S., 180.)

But, as this court declared in the case of *Transportation Company* v. *United States* (99 U. S., 642):

> Acts done in the proper exercise of governmental powers and not directly encroaching upon private property, though their consequences may impair its use, are univer-

> sally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agent or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542, and notes.

It is not contended in the case at bar that Fort Foster encroaches in any manner upon appellants' land or that the United States has appropriated any part of their land in the sense that its officers or agents actually entered upon or physically took possession thereof, or ousted appellants therefrom, or by direct orders limited or restricted appellants in any manner in the use thereof; but it is asserted (brief, pp. 25, 26), upon the principle of the case of *Chappell* v. *United States* (decided upon demurrer by the United States Circuit Court, District of Maryland, 34 Fed. Rep., 673), that because the most suitable and only safe field of fire for the guns is across appellants' land, appellants are necessarily prevented, without any further act upon the part of the Government, from erecting buildings and using their land for the purpose for which it is best adapted and for which it was acquired, to wit, as a summer resort, and hence appellants have been deprived of their property without compensation. (Brief, pp. 26 and 27.)

Manifestly, the condition thus supposed, even if true, which, as we have seen, the findings disprove, is

at most wholly theoretical and presents no element of physical invasion or visible appropriation within the rule laid down by this court.

The principle of the *Chappell* case *supra* is clearly distinguishable from that at bar, for the reason, as stated in the opinion, that Chappell was prevented by direct command of officers of a lighthouse board, acting under congressional authority, from erecting buildings upon and from otherwise using a strip of his land 60 feet wide lying between two range lights which it was requisite should be kept clear at all times to enable vessels to maintain their course on an adjacent river. The court very properly held that such a restriction upon the use of private property, when authorized by the United States, entitled the owner to compensation. In the case at bar, however, there has been no restriction of any nature whatever imposed upon the appellants in the use of their land, and they are as free to-day to devote it to any purpose they may desire as upon the day they first acquired it.

Again it is argued that, as the court has found (Finding XV, p. 29) the erection of Fort Foster and the installation of its guns has materially impaired the value of appellants' land, because probable guests, lessees, or purchasers will apprehend that the artillery may fire in time of peace over and across the lands, appellants' rights of use, exclusion, and disposition have been so seriously interfered with as to constitute a taking of the land (Brief, pp. 26, 27).

The fundamental error of appellants' position in this court is thus again demonstrated. The court has found that such use, even if it be conceded to be a use, was not necessary to the firing of these guns for practice and for all other necessary purposes in time of peace, and the terms of Finding XV itself establish the fact that the material impairment therein stated is merely conjectural and necessarily indirect and remote, depending solely upon the varied individual apprehensions of various probable guests.

As was observed by Bronson, C. J., in *Radcliff v. Brooklyn* (4 N. Y., 195):

> A fort, jail, workshop, fever hospital, or lunatic asylum erected by the Government may have the effect of reducing the value of a dwelling house in the immediate neighborhood, and yet no provision for compensating the owner of the house has ever been made in such case.

Furthermore, the appellants' use of the property and their right of exclusion, after the completion of the fort, remained exactly the same as it was before. Not a single restriction has been imposed thereon nor the slightest attempt made to deprive appellants of any right of exclusion or disposition which they theretofore possessed.

Again it is said that the single shots fired from each of the three guns of the fort upon the two occasions in 1902, which as stated in the finding was for the purpose of testing the guns (Finding XIII, Rec., p. 28), is a further demonstration that the use

of appellants' land was a necessary part of the Government's project. The court below, referring to the rule of *Emerson* v. *Taylor*, rejected this same contention in the following terms:

> It will thus be seen that under this rule the Government is the proprietor of that part of the flats situated to the west of line A-F, which the findings show is sufficient territory over and across which to fire the guns at Fort Foster for practice or any other purpose in time of peace. Such being the case, it can hardly be contended that the firing of these guns, each of them once, in another direction so as to send the projectiles over the claimants' land constitutes a "taking" of their property. We can only judge of what property, if any, the Government has designed to have taken, by that over which it has asserted some dominion, or from the possession or enjoyment of which it has actually deprived the owner. If the single discharge of its guns over the lands of the claimants caused them any damage, as it doubtless did, it was a loss over which, as against the Government, this court and no court has any jurisdiction. (Rec., p. 32.)

From the foregoing considerations, we think it clearly results that the proper and contemplated use of the battery in time of peace has neither infringed the appellants' rights of use, exclusion, or disposition of their land; and hence that there has been no taking of their property in the constitutional sense.

IV.

The injury of which appellants complain is not th result of a taking of any part of their property o a direct invasion thereof, but is consequentia damage for which no right of compensatio attaches.

The broad distinction between the taking of prop erty for public uses and an indirect or consequenti injury to such property by reason of some publi work has been indicated by this court in numerou cases.

In *Bedford* v. *United States* (192 U. S., 224) was said:

> The Constitution provides that private prop erty shall not be taken without just compens tion, but a distinction has been made betwe damage and taking, and that distinction mu be observed in applying the constitution provision. An excellent illustration is foun in *Gibson* v. *United States* (166 U. S., 269 The distinction is there instructively e plained, and other cases need not be cited.

In the Gibson case claimant owned a farm on island in the Ohio River valuable as a market garde She had wharves upon the river and used them for t purpose of transporting the produce of her farm to t city of Pittsburgh. Congress authorized the improv ment of the Ohio River by the construction of a di which diverted the water entirely from the claiman frontage, destroyed the only landing on the far and made it impossible for her to ship her produ

by water, thereby causing her great damage. This court held, however, that the damage sustained was not within the constitutional provision, and in the course of its opinion said:

> The fifth amendment to the Constitution of the United States provides that private property shall not "be taken for public use without just compensation." Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power. (166 U. S., p. 275.)

In that case the appellant acquired her farm before the dike was projected, and therefore without knowledge or notice of its probable construction. Here, however, the plaintiffs not only had full knowledge of the purpose for which the Government reservation had been acquired, but a fort had been practically completed upon it.

In *Chicago, Burlington & Quincy R. R. Co.* v. *Drainage Comm'rs* (200 U. S., 561) this court declared with reference to the distinction between the two classes of cases:

> Upon the general subject there is no real conflict among the adjudged cases. Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the Constitution, a "taking" of private property for public use. If the injury complained of

> is only incidental to the legitimate exercise of governmental powers for the public good, then there is no *taking* of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution.

So also in *Transportation Company* v. *United States* (99 U. S., 642) it was said:

> The extremest qualification of the doctrine is to be found perhaps in *Pumpelly* v. *Green Bay Company* (13 Wall., 166) and in *Eaton* v. *Boston, Concord & Montreal Railroad Co.* (51 N. H., 504). In those cases it was held that permanent flooding of private property may be regarded as a "taking." In those cases there was a physical invasion of the real estate of the private owner and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiffs' lot. All that was done was to render for a time its use more inconvenient.

The principle of these cases and the language last quoted, which is especially apposite, appear to completely dispose of appellants' contention that their property has been taken in this case within the meaning of the constitutional provision.

It may not be amiss, however, to invite attention to a few of the many other cases in which the same principle has been applied.

In *Scranton* v. *Wheeler* (179 U. S., 141) it was held:

> The prohibition in the Constitution of the United States of the taking of private property

for public use without just compensation has no application to the case of an owner of land bordering on a public navigable river whose access from his land to navigability is permanently lost by reason of the construction, under authority of Congress, of a pier resting on submerged lands away from but in front of his upland, and which pier was erected by the United States, not with any intent to impair the right of riparian owners, but for the purpose only of improving the navigation of such river.

It was not intended by that provision in the Constitution that the paramount authority of Congress to improve the navigation of the public waters of the United States should be crippled by compelling the Government to make compensation for an injury to a riparian owner's right of access to navigability that might incidentally result from an improvement ordered by Congress.

See also *Union Bridge Co.* v. *United States* (204 U. S., 361) and authorities therein cited.

In *Gibson* v. *United States*, *supra*, the court quotes with approval the case of *Monongahela Navigation Company* v. *Coons* (6 Watts & S., 101), in which the site of the plaintiff's mill was destroyed by the backing up of water caused by the construction of a dam in the aid of navigation under State authority.

The court of Pennsylvania held that no compensation could be recovered because such injury was consequential, and there was no direct invasion of the

plaintiff's property by the works in question, and said:

> In one instance, a profitable ferry on the Susquehanna, at its confluence with the Juniata, was destroyed by the Pennsylvania Canal; and in another, an invaluable spring of water at the margin of the river near Selinsgrove was drowned. These losses, like casualties in the prosecution of every public work, are accidental but unavoidable; and they are but samples of a multitude of others.

In the case of *Lansing* v. *Smith et al.* (8 Cowen, 146) it was said:

> The statute (sess. 46, ch. 111) authorizing the construction of a basin in the Hudson River, in the city of Albany, and erections, whereby the docks, etc., owned by individuals above were rendered inaccessible, or less easily approached by vessels, etc., and therefore much depreciated in value, though it provided no compensation for such a consequence, is not unconstitutional, either as taking private property for public use without compensation or impairing the obligation of contracts.
>
> This is not a direct invasion of private property, but remote and consequential merely, and arising from a public improvement. The injury is one to which individuals must submit as the price of the social compact; and, in the eye of the law, the injury is *damnum absque injuria*.

The same rule applied to acts done by railroad companies in the proper exercise of power conferred upon them by lawful authority, as is well illustrated

in *Booth* v. *R. R. Co.* (140 N. Y., 262). In that case the defendants owned a lot in the city of Rochester adjacent to the property of the plaintiffs. In the projected extension of its road it became necessary, in order to comply with conditions imposed by the city authorities, to depress the defendant's roadbed below the surface of the street, and for this purpose material was excavated and blasted from the defendant's lot, as a consequence of which the plaintiff's house on the adjacent lot was seriously injured, its foundations cracked, beams and joists pulled apart, plaster loosened, and the house generally wrenched and rendered insecure. No rock or other material was thrown by the blast upon the plaintiff's lot. The court said:

> It must be assumed from concessions made on the trial and from the rule of law laid down by the court that blasting was the only mode of removing the rock practically available, that it was conducted with due care, and that it was necessary to enable the defendant to conform the roadbed to the established grade. This is a case, therefore, of unavoidable injury to the plaintiff's house, occasioned by the act of the defendant in blasting on its own premises in order to adapt them to a lawful use, the mode adopted being the only practicable one and the work having been prosecuted with due care and without negligence. The question is whether the act of the defendant, connected with the resulting injury, was a legal wrong for which the plaintiff has a right of action.

In deciding that the facts were not sufficient to sustain a cause of action the court announced the following rule:

> The test of the permissible use of one's own land is not whether the use or act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, Was the act or use a reasonable exercise of the dominion which the owner of the property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy?

To the same effect is the ruling in *Hardman* v. *N. E. R. R. Co.* (L. R. [3 C. P. Div.], 168); *Beseman* v. *Railroad Co.* (50 N. J. L. R., 235); *Carroll* v. *R. R. Co.* (40 Minn., 168).

In *Benner* v. *Atlantic Dredging Co.* (134 N. Y. Rep., 156), the principle was extended to cases—

> Where a contractor doing, in appropriate and proper manner, public work required by a contract with said Government, which it is authorized to make, and exercising due care in the prosecution thereof, injures private property, he is not liable therefor.

The injury in that case was to the plaintiff's house, caused by the jar and concussion resulting from the blasting of rock at Hell Gate in East River, and it was held that there could be no recovery for the reason that the defendant was acting under the authority of

the Government by virtue of a contract authorized by Congress. The court said:

> It being lawful for the sovereign to exercise its lawful power, it must follow that whatever results from its proper exercise is not unlawful, and if any injury, direct or consequential, results to the individual, he is remediless, except so far as the sovereign gives him a remedy.
>
> The Government has provided for such direct injuries as amount to the taking of private property for public use by the constitutional provision that it must not be done without full compensation. If the present were such a case, it would seem that the plaintiff's remedy would be to make the proper application to the Government. The defendant having done no more than it was fully authorized to do, and which its duty to the Government under the contract required it to do, would be blameless and the Government liable because of its constitutional obligation.
>
> But this is not a case of taking private property, or of direct, but is of consequential injury. The plaintiff's house was 3,000 feet distant from the place of the explosions. The injuries to it were caused by the shaking of the earth or pulsations of the air, or both, resulting from the explosion. There was no physical invasion of the plaintiff's premises by casting stones or earth or other substance upon them, as in *Hay* v. *Cohoes Co.* (2 N. Y., 159); *Tremain* v. *Cohoes Co.* (id., 163); *St. Peter* v. *Denison* (58 id., 416), and hence no going outside

> of the authority actually conferred and conferrable as in those cases. * * *
>
> One can not confine the vibration of the earth or air within inclosed limits, and hence it must follow that, if in any given case they are rightfully caused, their extension to their ultimate and natural limits can not be unlawful, and the consequential injury, if any, must be remediless.

CONCLUSION.

In the case at bar there has been no encroachment whatever upon the lands of the plaintiffs, nor the slightest interference or restriction upon the use of the property.

The Government has merely completed, in a careful and prudent manner, a public work of vital importance to the whole people, upon its own property, purchased for that express purpose many years before the appellants acquired any interest whatever in the abutting land. To quote the language of the Supreme Court of New Jersey in *Stevens* v. *Paterson Railroad Co.* (34 N. J. L., 532, 549):

> Every citizen is required at times to contribute something, by way of sacrifice, to the public good. Such partial evil is the price which is paid for the advantages incident to the social state. It is not necessary to refer extensively to authorities in confirmation of the doctrine that, as a general rule, the public domain is subject altogether to the control of the legislature, and that incidental damage resulting to individuals from the exercise of

such control gives no legal claim to compensation.

We submit that the judgment of the Court of Claims dismissing the petitions was correct, and that it should be affirmed.

JOHN Q. THOMPSON,
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FREDERICK DE C. FAUST.
Attorney.

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PEABODY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 289. Argued February 27, 1913.—Decided December 15, 1913.

The subjection of land to the burden of governmental use by constantly discharging heavy guns from a battery over it in time of peace in such manner as to deprive the owner of its profitable use would constitute such a servitude as would amount to a taking of the property within the meaning of the Fifth Amendment and not merely a consequential damage.

In order, however, to maintain an action for such a taking it must appear that the servitude has actually been imposed on the property.

A suit against the Government must rest on contract as the Government has not consented to be sued for torts even though committed by its officers in discharge of their official duties.

A contract with the Government to take and pay for property cannot be implied unless the property has been actually appropriated.

The mere location of a battery is not an appropriation of property within the range of its guns.

Where it appears that the guns in a battery have not been fired for more than eight years, and the Government denies that it intends to fire the guns over adjacent property except possibly in time of war, this court will not say that the Government has taken that property for military purposes.

46 Ct. Cls. 39, affirmed.

THE facts, which involve the determination of whether the establishment of a battery in connection with its military fortifications by the United States in the vicinity of claimants' land amounted under the circumstances of this case to a taking of property under the Fifth Amendment, are stated in the opinion.

Mr. John Lowell, with whom *Mr. William Frye White* and *Mr. Chauncey Hackett* were on the brief, for appellants:

The court below erred in not finding that the property of the claimant has been taken without just compensation where guns of a permanent battery established by the United States have been fired over and across the same; and where the guns are so fixed as to make it possible to do so in the future.

It also erred in not holding that under the circumstances of this case the property or a property right in the same has not been taken within the meaning of the Fifth Amendment and that the United States is liable for the value thereof.

It is impossible to fire the guns with safety except over the claimants' land.

The United States intended to fire the guns over the claimants' land in time of peace.

Property includes the collection of rights attaching to

the things or land. Those rights include rights of use, exclusion and disposition. It is these rights which constitute property and it is the interference with these rights which, if carried so far as to impair materially their value, constitutes a taking. *Old Colony R. R. Co.* v. *Plymouth*, 14 Gray, 155, 161; Hare on American Constitutional Law, 357; 1 Bentham's Works (1843), 308; *Morrison* v. *Semple*, 6 Binn. 94, 98; *Jackson* v. *Honsel*, 17 Johns. 281; *Chicago &c. R. R. Co.* v. *Englewood R. R. Co.*, 115 Illinois, 375, 385; *Denver* v. *Beyer*, 7 Colorado, 113; *St. Louis* v. *Hill*, 116 Missouri, 527; *Sinking Fund Cases*, 99 U. S. 700, 738; 1 Lewis on Eminent Domain, 3d ed., 51; 2 Austin's Jur. 1051.

As to what constitutes a taking, see Sedgwick, Const. Law, 2d ed., 456; 1 Lewis on Eminent Domain, 56; *Stockdale* v. *Rio Grande Ry. Co.*, 28 Utah, 201, 211; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; 1 Hare on Amer. Const. Law, 388; *United States* v. *Lynah*, 188 U. S. 445; *Chappell* v. *United States*, 34 Fed. Rep. 673; *S. C.*, 160 U. S. 499; *Eaton* v. *B. C. & M. R. R. Co.*, 51 N. H. 504, 511; *Grand Rapids Booming Co.* v. *Jarvis*, 30 Michigan, 308, 321; *Thompson* v. *Androscoggin Imp. Co.*, 54 N. H. 545.

When the United States acquires the fee of the land over which the right of way goes, that is a taking of the right of way. *United States* v. *Welch*, 217 U. S. 338.

Where a part only of claimant's land was flooded, besides the market value of the land flooded, just compensation includes damage to the remaining land resulting from such taking. *United States* v. *Grizzard*, 219 U. S. 180. Nor is *Sharp* v. *United States*, 191 U. S. 341, in conflict, for that case went off on the ground that the depreciation occurred to a distinct tract of land. Compare *United States* v. *Alexander*, 148 U. S. 186; *Sprague* v. *Dorr*, 185 Massachusetts, 10.

See also 15 Cyc. 660, note 41; and *Ib.*, pages 661–670, inclusive, and notes.

Claimants' property has been taken.

It cannot possibly be said that with this menace constantly threatening the claimants' land, materially and permanently impairing its value, their rights of use, exclusion and disposition, have not been so seriously interfered with as to constitute a taking.

The claimants' land extends in contemplation of law *usque ad cælum*. Co. Litt. 4a; 2 Bla. Com. 18; 3 Kent Com. 401; Webb's Pollock on Torts, p. 423; *Lyman* v. *Hale*, 11 Connecticut, 546; *Wandsworth* v. *Tel. Co.*, 13 Q. B. Div. 912; *Humphries* v. *Brogden*, 12 Q. B. 739; *Haines* v. *Roberts*, 6 El. & Bl. 643; 7 El. & Bl. 625; Erskine's Inst. Laws Scotland, Book ii, title 9, § 11; 1 American Law Reg. (N. S.) 577; *Lemmon* v. *Webb*, 1 App. Cases (1895), 1; *Corbett* v. *Hill*, L. R. 9 Eq. 671.

The property of the claimants consisted of the rights of user, exclusion and disposition. So far as they are concerned, these rights have been greatly impaired, in fact have become valueless. The Court of Claims has found that this impairment of the value of the property will continue so long as the fort and artillery therein are maintained. The United States is in the enjoyment of the greater part of these rights. It is clear, therefore, that the United States has taken the claimants' property within the meaning of the Fifth Amendment.

The decision of the Court of Claims is wrong. *Emerson* v. *Taylor*, 9 Maine, 42, relied on below, does not apply, as the acts complained of in that case did not constitute a taking within the meaning of the Fifth Amendment.

Transportation Co. v. *Chicago*, 99 U. S. 635; *Gibson* v. *United States*, 166 U. S. 269; *Scranton* v. *Wheeler*, 179 U. S. 141; *Bedford* v. *United States*, 192 U. S. 217, relied on by the Government as holding that the acts complained of did not constitute a taking within the meaning of the

Fifth Amendment are also clearly distinguishable. See *United States* v. *Lynah*, 188 U. S. 445.

The claimants' property has been taken: the United States has taken title to the whole of the claimants' property commanded by the guns by acquiring the value thereof and assuming dominion thereof *in perpetuo*.

The findings show that the land was of little value except as a summer resort, and that it can no longer be used for such purpose.

This is not a case of loss of access, nor a case where the land was subject to a servitude in favor of the United States; nor a case where the damage was consequential.

It is a case where upon the firing of the guns the United States took the valuable use of the land and thereby virtually, though not formally, has appropriated the title as well.

Mr. Frederick De C. Faust, with whom *Mr. Assistant Attorney General Thompson* was on the brief, for the United States:

Appellants, as record owners, are estopped from asserting that the property has been taken.

Appellants' fundamental proposition to establish the taking rests upon a false premise.

There has been no taking of appellants' property within rule established by decisions of this court.

The injury of which appellants complain is consequential, for which no right of compensation attaches.

In support of these contentions, see *Bedford* v. *United States*, 192 U. S. 224; *Benner* v. *Atlantic Dredging Co.*, 134 N. Y. 156; *Beseman* v. *R. R.*, 50 N. J. L. 235; *Booth* v. *R. R. Co.*, 140 N. Y. 252; *Carroll* v. *R. R. Co.*, 40 Minnesota 168; *Chicago R. R. Co.* v. *Drainage Comrs.*, 200 U. S. 561; *Chappell* v. *United States*, 34 Fed. Rep. 673; *Dist of Col.* v. *Barnes*, 197 U. S. 146; *Eaton* v. *Boston R. R.*, 51 N. H. 504; *Emerson* v. *Taylor*, 9 Maine, 42; *Gibson* v. *United States*,

U. S. 269; *Hay* v. *Cohoes Co.*, 2 N. Y. 159; *Heyward* *United States*, 46 Ct. Cls. 484; *Hurdman* v. *R. R. Co.*, R. (3 C. P. Div.) 168; *Lansing* v. *Smith*, 8 Cowen, 146; *Clure* v. *United States*, 116 U. S. 145; *Manigault* v. *ings*, 199 U. S. 473; *Monongahela Nav. Co.* v. *Coons*, Watts & S. 101; *Peabody* v. *United States*, 43 Ct. Cls. 19; *rtsmouth Land Co.* v. *Swift*, 82 Atl. Rep. 524; *Pumpelly* *Green Bay Co.*, 13 Wall. 166; *Radcliff* v. *Brooklyn*, 4 Y. 195; *Scranton* v. *Wheeler*, 179 U. S. 141; *Sisseton* *lians* v. *United States*, 208 U. S. 566; *Sharp* v. *United* *tes*, 191 U. S. 341; *St. Peter* v. *Dennison*, 58 N. Y. 416; *rens* v. *Paterson R. R.*, 34 N. J. L. 549; *Transportation* v. *United States*, 99 U. S. 642; *Tremain* v. *Cohoes Co.*, 2 Y. 163; *Union Bridge Co.* v. *United States*, 204 U. S. ; *United States* v. *Adams*, 6 Wall. 112; *United States* v. *zzard*, 219 U. S. 180; *United States* v. *Lynah*, 188 U. S. ; *United States* v. *Sewell*, 217 U. S. 601; *United States* v. *lch*, 217 U. S. 338.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is an appeal from a judgment of the Court of ims dismissing petitions for compensation for land ged to have been taken by the United States for public . 46 Ct. Cls. 39. Separate suits were brought by Sam- l Ellery Jennison, the owner at the time the taking is d to have occurred, by his mortgagees, Mary R. Pea- dy and the Saco and Biddeford Savings Institution, and his grantee, the Portsmouth Harbor Land and Hotel ompany. These suits were consolidated and the merits re heard. The following facts are shown by the find- gs:

The land in question, comprising about two hundred res, forms the southern corner of Gerrish Island, the uthernmost point on the coast of Maine. It lies about ree miles from Portsmouth, bordering on the south and

east the Atlantic ocean and on the west the entrance to Portsmouth harbor. Its value consists almost entirely in its adaptability for use as a summer resort and it had been improved for this purpose by the erection of a hotel, cottages, outbuildings and pier, by the construction of roads, and by the provision of facilities for summer recreations.

In 1873, long before Jennison acquired title and improved the property, the United States began the construction of a twelve-gun battery upon a tract of seventy acres lying north and west of the land in suit and abutting upon it. This battery was to be one of the outer line of defenses of Portsmouth harbor, for which appropriation had been made by the act of February 21, 1873, c. 175, 17 Stat. 468. (See also act of April 3, 1874, c. 74, 18 Stat. 25.) By the year 1876, a large sum had been expended upon the work which had reached an advanced stage of construction. Operations were closed in September of that year, however, for want of funds and the fortification was not occupied by the United States thereafter until work was resumed in 1898. The Government then constructed on the same site a battery consisting of three ten-inch guns and two three-inch rapid fire guns. It was practically completed on June 30, 1901, and was transferred to the artillery on December 16, 1901, being named Fort Foster.

No part of the fort encroaches upon the land in suit; the fort is within two hundred feet of its northwestern corner and about one thousand feet from the hotel. The claimants' land lies between the fort and the open sea to the south and southeast; and the guns have a range of fire over all the sea-front of the property. As the government reservation on its western side borders the entrance to the harbor, the court found that there was an available portion of the shore belonging to the reservation which permitted the firing of the guns in a southwesterly direc-

r practice and for all other necessary purposes in peace" without the projectiles passing over the question. This conclusion was reached by applying local law governing the boundary lines of conproprietors where there is a curvature of the shore. v. *Taylor*, 9 Maine, 42. It may be noticed here petitioners insist that the guns could not be fired narrow area thus found to be a part of the reserwithout endangering life and property along the ampshire coast and they present in their brief a support their assertion. The Government urges s map has not been identified and is wholly incomand that, as the question is one of fact, the finding deemed conclusive. But while thus finding that as a line of fire available to the Government over shore property, the court also found that the most field of fire for practice and other purposes in time would be over the claimants' land.

about June 22, 1902, two of the guns were fired for pose of testing them at a target off the coast, the passing over the land in suit; and another gun d for the same purpose and to the same effect on ber 25, 1902, the resulting damage to buildings and y amounting to $150.

of the guns has been fired since, but they have been good condition by a detail from Fort Constitution s situated across the Piscataqua River. The court urther states in its findings that "it does not appear e evidence that there is any intention on the part of vernment to fire any of its guns now installed, or may hereafter be installed, at said fort in time of ver and across the lands of the claimants so as to them of the use of the same or any part thereof or re the same by concussion or otherwise, excepting intention can be drawn from the fact that the guns stalled in said fort are so fixed as to make it possible

so to do and the further fact that they were so fired upon the occasions as hereinbefore found."

In the years 1903 and 1904, the hotel which had previously been profitable was conducted at a loss; since 1904, it has been closed and the cottages have been rented only in part and at reduced rates. It is found that the erection of the fort and the installation of the guns have materially impaired the value of the property and that this impairment will continue so long as the fort and artillery are maintained. This is found to be due to the apprehension that the guns will be fired over the property.

The question is whether upon this showing the petitioners were entitled to recover.

It may be assumed that if the Government had installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made. The subjection of the land to the burden of governmental use in this manner might well be considered to be a 'taking' within the principle of the decisions (*Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 177, 178; *United States* v. *Lynah*, 188 U. S. 445, 469; *United States* v. *Welch*, 217 U. S. 333, 339) and not merely a consequential damage incident to a public undertaking which must be borne without any right to compensation (*Transportation Co.* v. *Chicago*, 99 U. S. 635, 642; *Gibson* v. *United States*, 166 U. S. 269; *Scranton* v. *Wheeler*, 179 U. S. 141, 164; *Bedford* v. *United States*, 192 U. S. 217, 224; *Jackson* v. *United States*, 230 U. S. 1, 23).

But, in this view, the question remains whether it satis-

factorily appears that the servitude has been imposed; that is, whether enough is shown to establish an intention on the part of the Government to impose it. The suit must rest upon contract, as the Government has not consented to be sued for torts even though committed by its officers in the discharge of their official duties (*Gibbons* v. *United States*, 8 Wall. 269, 275; *Langford* v. *United States*, 101 U. S. 341, 343; *Schillinger* v. *United States*, 155 U. S. 163, 169; *Russell* v. *United States*, 182 U. S. 516, 530; *Harley* v. *United States*, 198 U. S. 229, 234); and a contract to pay, in the present case, cannot be implied unless there has been an actual appropriation of property (*United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656, 657).

The contention of the petitioners, therefore, is plainly without merit so far as it rests upon the mere fact that there is a suitable, or the most suitable, field of fire over their property. Land, or an interest in land, cannot be deemed to be taken by the Government merely because it is suitable to be used in connection with an adjoining tract which the Government has acquired, or because of a depreciation in its value due to the apprehension of such use. The mere location of a battery certainly is not an appropriation of the property within the range of its guns.

The petitioners' argument assumes that the guns, for proper practice, must be fired over the land in suit and, hence, that this burden upon it was a necessary incident to the maintenance of the fort. The fact of the necessity of practice firing is said to be established by the finding with respect to the line of fire over the Government's portion of the shore in which it is said that this would be sufficient "for purposes of practice and for all other necessary purposes in time of peace." But, in the light of other findings, this is far from affording a sufficient foundation for the conclusion upon which the petitioners insist. On the contrary, that no such necessity as is now asserted can be assumed from the mere fact that the fort is main-

tained is demonstrated by the facts of this case. This suit was tried in the latter part of the year 1910 and it appeared that none of the guns had been fired for over eight years. When the suit was brought in 1905, nearly two years and a half had elapsed since the firing of a shot. The guns have been fired only upon two occasions, or three times in all, and this firing took place in 1902, shortly after the installation of the guns, for the purpose of testing them. It may be that practice in firing the guns would be highly desirable, but it is too much to say upon this record that the fort would be useless without it. Nor are we at liberty to conclude that the Government has taken property, which it denies that it has taken, by assuming a military necessity in the case of this fort which is absolutely contradicted by the facts proved.

Reduced to the last analysis, the claim of the petitioners rests upon the fact that the guns were fired upon the two occasions in 1902, as stated, and upon the apprehension that the firing will be repeated. That there is any intention to repeat it does not appear but rather is negatived. There is no showing that the guns will ever be fired unless in necessary defense in time of war. We deem the facts found to be too slender a basis for a decision that the property of the claimants has been actually appropriated and that the Government has thus impliedly agreed to pay for it.

The judgment is affirmed.

Affirmed.